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74-24

George Schaefer vs. Raymond Rock

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Springfield
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present—

HONORABLE Samuel Smith, Justice

* HONORABLE James C. Craven, Justice

HONORABLE Leland Simkins, Presiding Justice

Robert Conn, Clerk

Hugh A. Campbell, Sheriff

BE IT REMEMBERED, that afterwards on
February 28, 1975 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

No. 74-24

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

GEORGE SCHAEFER,)	
)	
Plaintiff-Appellee-)	
Cross-Appellant,	)	Appeal from the Circuit
	)	Court of Fulton County,
v.	)	Illinois.
)	
RAYMOND ROCK, FERN ROCK,)	
MELVIN D. HARRIS and	)	Honorable
SHIRLEY J. HARRIS,	)	Keith F. Scott,
	)	Judge Presiding.
)	
Defendants-Appellants-)	
Cross-Appellees.)	

Abstract

Mr. JUSTICE CRAVEN delivered the opinion of the court:

This is an appeal from an order in an ejectment proceeding declaring that the plaintiff was entitled to ownership and possession of a disputed portion of land and the defendants had no riparian rights to a strip mine lake located on property belonging to the plaintiff. There is a cross-appeal from that portion of the trial court's order that declared that the defendant had an easement by prescription for the limited purpose of pumping water from the lake for household purposes and for watering livestock. The land in question is a sloping northern embankment of the lake which, by reason of the language in the deed, the trial court found to be the boundary of the property line between the parties.

The two parcels of property involved were originally owned as a single parcel. The property now owned by the defendants was transferred to their predecessor in title by a deed containing a metes and bounds description including in the description language descriptive of one boundary as "in a southeasterly direction 477 feet, to the high wall, thence in an easterly direction, # # #." (Emphasis supplied.) The legal issue presented in this case relates to the construction of the phrase "to the high wall". When referring to a strip mine lake, the testimony is that this term "to the high wall" means to the high wall and does not carry with it any riparian rights or access to the lake that exists on the premises below the high wall.

We see no necessity for a full recitation of the evidence in this case. No error of law appears and the trial court's findings of fact are not contrary to the manifest weight of the evidence. There is some conflict in the testimony with reference to the nature and extent of the use of a pump for purposes of pumping water. We cannot say that the findings of fact of the trial court that are fully set forth in a comprehensive opinion are contrary to the manifest weight of the evidence. An extended opinion on the issues of this case would have no precedential value, and, accordingly, pursuant to Supreme Court Rule 23 (Ill.Rev.Stat.1973, ch. 110A, § 23), the judgment of the circuit court of Fulton County is affirmed.

JUDGMENT AFFIRMED.

SIMKINS, P.J., and SMITH, J., concur.

73-266)
73-249) Cons.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L. L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:
On March 6, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE

APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAR - 6 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.) Appeal from the Circuit
) Court for the Seventeenth
) Judicial Circuit, Winne-
) bago County, Illinois.
 RICKY COOK,)
)
 Defendant-Appellant.)

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant pled guilty to the separate charges of theft over \$150, and forgery. He was sentenced to concurrent terms of two to four years. We have consolidated the separate appeals for the purpose of disposition. On motion pending these appeals, this court modified the sentences to concurrent terms of sixteen months to four years.

Defendant claims that the pleas of guilty were not in conformance with Supreme Court Rule 402 and that the waiver of indictment proceedings, relative to the theft charge, did not comply with Supreme Court Rule 401(b).

On May 26, 1972, the defendant, in a motion subscribed and sworn to under oath, moved to waive prosecution by indictment on the theft charge. The motion stated that the defendant knew and

understood that he had a constitutional and statutory right to be prosecuted by indictment, but that he wished to waive these rights. Before allowing the motion, the court stated:

" All right. The Court will advise you what it means to waive the Grand Jury. If you don't waive the Grand Jury, then when the Grand Jury meets--it's a body of twenty-six people selected from the County known as the Grand Jury--they will hear the evidence and if a majority of them were of the opinion that there was probable cause to hold you for trial, then they would return an Indictment and you would be tried on the Indictment.

Where you waive the Grand Jury, then the State's Attorney would file what is known as an Information against you which in this case would charge you with theft. After the Indictment is returned or the Information is filed, then the procedure is the same.

Now, the crime of theft is an offense, punishable by a term in the penitentiary of not less than one year nor more than ten years, or any combination of years, not less than the minimum or more than the maximum.

Now, knowing that, do you want to waive the Grand Jury?

The Defendant: Yes.

The Court: Let the record show that the defendant has been advised of his rights and the nature of the charge against him. He persists in his waiver of the Grand Jury. Leave given to file the Information."

On December 5, 1972, defendant moved the court to accept his pleas of guilty to the charges of theft and forgery. Defense counsel stated that the change of plea was the result of negotiations with the State and that the sentence agreed to was concurrent terms of two to four years. The defendant acknowledged that he understood this to be the agreement.

In open court, the defendant was admonished on each charge separately. Relative to the charge of theft, the court read from the information the nature of the charge, informed the defendant that he was charged with a felony, that he had a right to a jury or bench trial, that he had a right to be confronted by his accusers,

that he had a right to establish any defense he might have and that by pleading guilty he waived these rights. The court also informed the defendant of the minimum and maximum sentences that could be imposed. Thereafter, the State gave a synopsis of the facts of the theft case against the defendant. The defendant answered in the affirmative when asked if these facts were true, whereupon the court accepted the defendant's plea of guilty to the theft charge.

Pertinent to the forgery charge, the court read from the indictment the nature of the charge, informed the defendant that he had a right to trial by judge or jury, that he had a right to be confronted by his accusers, that he had a right to establish any defense he might have, and that by pleading guilty he waived these rights. The court also informed the defendant of the minimum and maximum sentences that could be imposed. Thereafter, the State gave a synopsis of the facts of the forgery case against the defendant. The defendant answered, "Yes, sir, most of it," when asked if these facts were true. The court then asked the defendant if there was anything he wished to correct or alter, to which the defendant replied, "Well, no, that's about it," whereupon the court accepted the defendant's plea of guilty to the forgery charge.

Before sentence was imposed by the court, the following dialogue took place between the assistant state's attorney and the defendant:

"[Asst. State's Attorney]:*** The point is, the agreement is 2 to 4, and that is what you expected, is it not?

The Defendant: Yes, sir.

[Asst. State's Attorney]: Do you have any objections or complaints about your attorney?

The Defendant: No, sir.

[Asst. State's Attorney]: You think he has represented you properly?

The Defendant: Yes, sir.

[Asst. State's Attorney]: You are satisfied with the plea, and no other promises have been made to you either by Mr. Vella or me?

The Defendant: No."

Thereupon, the trial court imposed concurrent sentences of 2 to 4 years on the theft charge and on one count of forgery. A second count of forgery and a bond-jumping charge were dismissed on motion by the State; and the defendant waived a hearing in aggravation and mitigation.

The defendant argues that the trial court failed to comply with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, §402) in that (1) in each case it failed to ascertain that the defendant understood the nature of the charge; (2) in each case it failed to ask defendant if his plea of guilty was voluntary; and (3) in the theft case it failed to inquire whether defendant understood that by pleading guilty he waived his right to plead not guilty and his right to a trial of any kind.

Supreme Court Rule 402 requires substantial, not literal compliance with its provisions. Additionally, the entire record may be considered in determining whether the accused understood the nature of the charge. The test for determining that the essentials of the rule have been met is whether an ordinary person in the circumstances of the accused would understand the remarks and advice of the court as conveying the information required. People v. Krantz, 58 Ill. 2d 187, 192-93 (1974).

Here, although defendant was not directly asked if he understood the nature of the charge, the court's reading of the indictment and information and the recital of anticipated testimony of witnesses for the prosecution, without protest and, indeed, with defendant's affirmance, demonstrates that the accused, as an ordinary person, understood the nature of the charges against him. See People v. Krantz, supra; People v. Mims, 42 Ill. 2d 441, 444 (1969).

As to the voluntariness of the pleas, the rule requires the court to determine whether any force or threats or any promise apart from the plea agreement was used to obtain the plea. The record reveals no inquiry having been made of defendant as to whether any force or threats were used to obtain the pleas. The record, however, leaves no doubt that the defendant understood that in return for his pleas of guilty a 2 to 4 year sentence would be imposed. Further, in response to the question of whether any other promises had been made to him, the defendant answered in the negative. Upon consideration of these facts and in light of the entire record, we conclude that, except for the plea agreement, the defendant was made no promises and his pleas were not the result of any force or threat.

"While we do not approve of any failure to comply strictly with the explicitly stated requirement of Rule 402, it does not follow that every deviation therefrom requires a reversal. If upon review of the entire record it can be determined that the plea of guilty made under the terms of the plea agreement was voluntary, and was not made as the result of force, threats or promises other than the plea agreement, the error resulting from failure to comply with Rule 402(b) is harmless." People v. Ellis, 59 Ill. 2d 255, 257 (1974).

We find no merit in defendant's third contention. The trial court informed the defendant of and ascertained his understanding that he had a right not to plead guilty or not guilty, that he had a right to trial by judge or jury, and that by pleading guilty he waived these rights.

Finally, defendant contends that the trial court erred in accepting his waiver of indictment without first informing him of the nature of the charge. This is belied by defendant's own verified motion seeking to waive intervention of the grand jury. In that motion, defendant stated that he knew and understood that he had a constitutional right to be prosecuted by indictment. The motion further stated:

- "2. That the defendant was arrested on the 5 day of March, 1972, on the charge of Theft. That on March 6, 1972, he was presented before Judge Cook who informed him of the charge against him, provided him with a copy of the charge and appointed the Public Defender to represent him."

On the basis of these findings, the judgments are affirmed.

Judgments affirmed

GUILD and RECHENMACHER, J.J. - concur

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	Appeal from the Circuit Court
	)	of Randolph County
v.)	
)	
MICHAEL BOWEN,	)	Honorable Carl Becker,
	)	Judge Presiding.
Petitioner-Appellant.)	

Mr. JUSTICE CARTER delivered the opinion of the court:

The petitioner pled guilty to escape, theft, and armed robbery, and was sentenced to 3 to 5 years in the penitentiary. On February 2, 1972, the petitioner filed a pro se post-conviction petition. Court-appointed counsel filed an amended post-conviction petition which was denied after an evidentiary hearing on August 6, 1973. This appeal follows the denial of the post-conviction petition. The only issue raised in this appeal is whether the petitioner was denied effective assistance of counsel during the post-conviction proceedings because the record fails to reflect that appointed counsel read the trial court record.

Illinois Supreme Court Rule 651(c) provides in pertinent part that:

The record filed in that court shall contain a showing, which may be made by certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petition filed pro se that are necessary for an adequate presentation of the petitioner's contentions. (Ill.Rev.Stat., ch. 110A, Rule 651(c) (1973))

This provision has been interpreted by our Supreme Court to allow petitioner's attorney to file during the pendency of an appeal a certificate attesting that he examined the record of proceedings. People v. Harris, 50 Ill.2d 31, 276 N.E.2d 327. This Court has adopted and followed this ruling in People v. Enyart, 18 Ill.App.3d 504, 310 N.E.2d 49 (5th Dist.). The affidavit of Attorney Robert N. Gandy, which amends the record, refutes the only point raised by the petitioner on appeal. Accordingly, we affirm the circuit court's denial of the post-conviction petition.

Affirmed.

Publish abstract only.

CONCUR: MORAN, KARNS, JJ.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2nd day of December, in the year of our Lord one thousand nine hundred and seventy-four, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On March 10, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

Abstract

FILED

IN THE :

APPELLATE COURT OF ILLINOIS

MAR 10 1975

SECOND DISTRICT

SECOND DIVISION

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit Court
	)	for the 16th Judicial Circuit,
RICHARD L. WHITLEY,	)	Kane County, Illinois.
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant, represented by appointed counsel, pleaded guilty to theft over \$150 and was sentenced on August 29, 1969 to a term of 3 to 9 years imprisonment. On January 5, 1973 he filed pro se his post-conviction petition which, as later amended by the Public Defender, alleged the violation of his constitutional rights in that at the hearing in aggravation and mitigation the trial court heard and considered the testimony of the Sheriff of Kane County that a charge of attempted murder of another jail inmate was then pending against defendant, and that such testimony of a charge not proven resulted in a more severe sentence than the 1 to 3 year sentence imposed on his co-defendant, Elbert E. Miley. Defendant appealed from the trial court's denial of that petition.

During the pendency of that appeal the indigent defendant's appointed counsel (Deputy State Appellate Defender) filed his motion to dismiss the post-conviction appeal and requested allowance of a direct appeal with the same record, on the ground that the record reveals that defendant had filed a timely notice of appeal from the

judgment of August 29, 1969 on which no further action was taken, and that a later order of June 11, 1970 appointing another member of the Public Defender's office for the purpose of presenting the "application for post-conviction hearing" must have been in error as no such petition was filed. The timely notice of appeal having given this court jurisdiction, and the State presenting no objections, we allowed defendant's motion.

The first issue presented is whether the court erred in accepting defendant's plea of guilty to the charge of theft over \$150. Defendant asserts that the court failed to properly and personally admonish defendant as to the nature of the charge and the consequences of his guilty plea, including the minimum and maximum range of punishment. Since the defendant's guilty plea was tendered and accepted in August, 1969 we look to former Supreme Court Rule 401(b), then effective (Ill. Rev. Stat. 1969, ch. 110A, par. 401(b)), which provided in part as follows:

"The court shall not permit a plea of guilty . . . unless the court finds from proceedings had in open court at the time . . . plea of guilty [is] entered . . . that the accused . . . understands the nature of the charge against him, and the consequences thereof if found guilty . . ."

See also Sections 115-2(a)(2) and 113-4(c) of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, pars. 115-2(a)(2) and 113-4(c)).

The facts here show that on the very day defendant and his co-defendant, Miley, were released from the State Penitentiary at Joliet they stole a parked car in Elgin, Illinois. They were arrested shortly thereafter and were later indicted as co-defendants for theft over \$150. At the arraignment of both defendants on July 11, 1969, the trial judge first addressed his co-defendant Miley, in defendant's presence, as follows:

"Mr. Miley, you are entitled to a trial by a Jury or a trial before the court. Theft in excess of a hundred and fifty dollars property value can subject you to possible punishment in the State Penitentiary

not less than one nor more than ten years. If the value is less than a hundred and fifty dollars, it is a misdemeanor and the maximum punishment is my recollection not more than \$500.00 fine and/or imprisonment in the State penal farm or county jail not more than one year."

Then the trial judge, addressing this defendant, stated:

"And, Mr. Whitley, you heard what I had to say to Mr. Miley about his rights of a trial by a Jury or a trial before the Court and possible range of punishment depending upon the value of the property stolen. If it is in excess of a hundred and fifty dollars, it is a felony and the punishment could be not less than one nor more than ten years in the penitentiary. * * *

"If it is a misdemeanor, punishment could be not to exceed \$500.00 fine and/or imprisonment in the Illinois State Penal Farm, not to exceed one year."

On August 19, about five weeks later, defendant and his co-defendant Miley, appeared before the same trial judge, the defendant being represented by Mr. Fred Morelli, Assistant Public Defender. Both defendants desired to change their pleas to guilty. Addressing the co-defendant Miley, the trial judge said:

"And on the 11th day of July you appeared here before me at which time you were explained that you are entitled to a trial by a Jury or a trial before the Court; that theft in excess of \$150.00 is punishable by imprisonment not less than one nor more than ten."

After additional colloquy relating to co-defendant Miley's guilty plea the prosecutor adverted to "same case, co-defendant * * * of Mr. Miley * * *". There followed some discussion in which the prosecutor, the defendant, his counsel and the trial judge took part, and then this colloquy occurred:

"THE COURT: Mr. Morelli has conferred with you with regard to the possible defense of your case; has he not?

DEFENDANT WHITLEY: Yes, sir.

THE COURT: He has advised you of your rights of a trial by a Jury or a trial before the Court and the nature and range of possible punishment for this offense?

DEFENDANT WHITLEY: Yes, sir."

It is clear from the foregoing that this defendant was fully

advised by the trial judge of the nature of the charge against him and his co-defendant Miley and the range of punishment, even though the court's statements were directed primarily at Miley. Both the defendant and his counsel were present. In addition, at the time of his arraignment defendant himself said that his counsel had explained to him the nature and range of possible punishment for the offense with which he was charged. In People v. Weakley, 45 Ill. 2d 549, cited by defendant the admonition as to the maximum penalty was held insufficient because the only admonition there was the trial court's inquiry of the Public Defender as to whether he explained to that defendant the question of the penalty involved, which counsel answered in the affirmative, and because the court cannot rely that defendant's counsel did so (p. 553). In the instant case the record establishes that defendant was properly informed at arraignment, some five weeks before acceptance of his guilty plea, concerning the nature of the charges and the range of possible punishment. While this period between the admonishment at the time of arraignment and that of the acceptance of the plea is longer than the four day interval in People v. Jacobs, 132 Ill. App. 2d 182, our holding in that case pp. 185-186, is equally applicable here, especially since there is nothing in this record to indicate any doubt but that the defendant was aware of the consequences of the plea of guilty.

In People v. Juerke, 6 Ill. App. 3d 559, cited by defendant there was, in addition to the very substantial time interval, testimony that that defendant had no recollection of the prior admonition as to potential punishment; that he was not advised by the court or by his counsel (which testimony was not impeached), and defendant's counsel was unable to say that he had advised defendant. Here defendant himself stated that his counsel had advised him of the nature

and range of possible punishment. Thus under all the circumstances present there was substantial compliance by the trial court with the applicable statute and rule.

The second issue raised by defendant is whether the court erred in admitting, at the combined hearing on the defendant's application for probation and in aggravation and mitigation, the testimony of the Kane County Sheriff as to defendant's misconduct in the County Jail. At that hearing the court also had before it the probation report with defendant's prior record, which stated among other things that defendant had been charged with attempted murder of a fellow cell-mate, in the County Jail. It should also be noted that at that hearing defendant's counsel presented a statement as to defendant's "background information" and related the circumstances of the offense of car theft with which he was charged, all of which defendant himself acknowledged as true and correct.

Evidence of defendant's misconduct in jail was a proper subject of inquiry and was relevant to a consideration of defendant's application for probation and to the hearing in aggravation and mitigation so as to enable determination by the court of the defendant's propensity toward violence and his rehabilitation potential. There is no suggestion in this record that the court considered the charge of attempted murder as equivalent to conviction. Moreover, the defendant had ample opportunity to cross-examine the Sheriff but did not do so. (People v. Loomis, 132 Ill. App. 2d, 903, 905, 906.) The cases cited by defendant are inapposite.

Thus we hold that the trial court did not err in admitting the evidence of defendant's misconduct in the County Jail.

Finally, we consider defendant's contention that the 3 to 9 year sentence imposed on defendant was excessive in view of the 1 to 3 year sentence which was imposed on his co-defendant Miley.

The fixing of sentences is an exercise of discretion. The authority of reviewing courts to reduce sentences should be applied with considerable caution and circumspection, (People v. Nelson, 41 Ill. 2d 364, 368,) because the trial judge/has a superior opportunity to make a sound determination concerning the punishment to be imposed than the do/appellate tribunals. (People v. Hampton, 44 Ill. 2d 41, and People v. Taylor, 33 Ill. 2d 417, 424.) Mere disparity of sentences between co-defendants does not of itself warrant the use of this court's power to reduce sentences imposed by the trial court. (People v. Brooks, 51 Ill. 2d 156 and People v. Shelton, 15 Ill. App. 3d 36.) From our examination of the record it is manifest that the disparity in the sentences is justified here because of the significant differences between the record of defendant Whitley and his co-defendant, Miley, and the sentence is not excessive. (People v. Lutz, 17 Ill. App. 3d 1001, 1003-1004.) Therefore, the judgment is affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

F O O T N O T E

1. Defendant's notice of appeal was filed on Monday, September 29. It was timely because the 30th day fell on Sunday, September 28, 1969.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE FREDERICK S. GREEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 12th day
of March A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12713

Agenda No. 74-248

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
v.	)	Sangamon County
	)	467-72, 468-72 and
JAMES ROGERS,	)	469-72
)	
Defendant-Appellant)	

Mr. JUSTICE GREEN delivered the opinion of the court:

The only issue in this case is one upon which the law has been clearly stated by many Supreme and Appellate Court decisions, but it arises out of a situation that has made continued appeals unavoidable. The penalties for some criminal offenses are changed by the Unified Code of Corrections (Ill.Rev.Stat.1973, ch. 38, par. 1001-1-1 et. seq.), which took effect January 1, 1973. It provides that sentences set forth in the Code are applicable to prosecutions started under prior law if they are less than under that law and if the case "has not reached the sentencing stage or a final adjudication," (Ill.Rev.Stat.1973, ch. 38, par. 1008-2-4). In construing a similar provision of the Illinois Controlled Substances Act (Ill.Rev.Stat. 1971, ch. 56 1/2, par. 1601) the court reasoned in People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1 that the legislature did not intend to be redundant in using the phrases "sentencing stage" and "final adjudication" and ruled that when a case was on direct appeal

after sentencing, it had not reached a "final adjudication". A sentence imposed when prior law was in effect was ordered reduced to conform to the Act. In People v. Harvey, 53 Ill.2d 585, 294 N.E. 2d 269, Chupich was followed in giving the same construction to the Code and this decision has been followed by the subsequent cases.

Defendant is similarly situated. On December 1, 1972, after negotiated pleas of guilty on three separate forgery charges, he was sentenced to three concurrent penitentiary terms of 5 to 10 years. At that time the penitentiary sentence for that offense was 1 to 14 years (Ill.Rev.Stat.1971, ch. 38, par. 17-3). Under the Code it is classified as a Class 3 felony the imprisonment for which is 1 to 10 years and with the further provision that if a minimum sentence of more than 1 year is imposed, it be no greater than 1/3 of the maximum term (Ill.Rev.Stat.1973, ch. 38, par. 1005-8-1). On appeal defendant's sole request is to have his minimum term reduced to 3 years and 4 months, which is 1/3 of his maximum term of 10 years.

We agree that defendant is entitled to his request and remand to the Circuit Court of Sangamon County with directions that an amended mittimus issue indicating that the minimum term of imprisonment is reduced from 5 years to 3 years and 4 months.

REMANDED WITH DIRECTIONS.

SIMKINS, P.J., and TRAPP, J., concur.

74-250

People vs. Henry Brisbon
and
Michael Lampkin

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present— PC

HON. ALLAN L. STOUWER, Presiding Justice

HON. JAY J. ALLOY, Justice

HON. RICHARD STENGEL, Justice

HON. TOBIAS BARRY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
March 18, 1975 _____ the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1975.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Kankakee County.
)	_____
vs.)	
	)	Honorable
HENRY BRISBON and MICHAEL LAMPKIN,	)	Victor Cardosi
	)	Presiding Judge
Defendant-Appellant.)	

PER CURIAM

Abstract

Defendants Henry Brisbon and Michael Lampkin appeal from a conviction of theft of an automobile worth more than \$150. Defendant Lampkin was sentenced to a term of 1 to 3 years and defendant Brisbon was sentenced to a term of 2 to 6 years in the penitentiary, with the Brisbon sentence to run concurrently with a rape sentence previously imposed by the Circuit Court of Cook County. Defendants filed notices of appeal and the trial court appointed the State Appellate Defender to represent the defendants on appeal, on April 29, 1974.

On January 22, 1975, the State Appellate Defender advised each defendant that the Appellate Defender would file a motion for leave to withdraw. Such motion for leave to withdraw as counsel on appeal in this court is made in accordance with the precedent of Anders v. California, 386 U.S. 738. The Appellate Defender now asserts that after careful examination of the record, a conclusion must be reached that an appeal would be wholly frivolous and without possibility of success. The motion for leave to withdraw was accompanied by an extensive brief in support of counsel's conclusion.

From the record it appears that pre-trial proceedings involved a motion to quash the arrest of defendants, in which a violation of the Fourth Amendment rights of defendants was asserted together with

a request to suppress all the evidence against them resulting from the arrest. . A hearing was held on this motion in defendant Brisbon's absence, which resulted from a voluntary failure of Brisbon to appear. Brisbon had also failed to appear at an earlier court date when his brother informed defense counsel that Brisbon was ill. The testimony at the hearing disclosed that the arresting officer stopped defendants, after receiving a radio bulletin that the occupants of a car of the same make, model, color, and license number as occupied by the defendants had failed to pay for a gas purchase at a nearby service station. The radio bulletin justified an investigatory stop (United States v. Hernandez, 486 F. 2d 614). Brisbon, the driver, had no driver's license and said that he did not own the car. This justified further investigation and when the radio dispatcher, responding to a request, reported that he had called a local car dealer to whom the dealer's plates on the automobile, which was stopped, belonged, the manager had disclosed that he did not loan the automobile to defendants. There was probable cause for a custodial arrest since an officer could rely on the information resulting from personal inquiry of a known reliable source. (United States v. Wilson, 479 F. 2d 936). The trial court properly denied the motion to quash the arrest and to suppress.

Both defendants waived a jury trial. At the bench trial, defense stipulated that the automobile which was occupied by defendants had been taken without authority from the rightful owner, the car dealer, less than 3 hours before defendants' arrest. The defendants also stipulated that the value of the automobile was in excess of \$150. The officers testified to the circumstances of the arrest. The evidence showed exclusive joint possession of the recently stolen property. This raised the presumption of guilt of theft of over \$150 against both defendants, even though both defendants offered an explanation of their possession consistent with innocence to both the arresting officer and the court. People v. Schaller, 52 Ill. 2d 130, 385 Ill. 93 (1943).

The trial court sitting as a trier of fact had a responsibility of evaluating the credibility of defendants' explanation in order to determine whether it sufficiently rebutted the presumption of guilt so as to raise a reasonable doubt. (People v. Donald, 132 Ill. App. 2d 598, 270 N.E.2d 85). The trial court, in view of the many questionable aspects of the defendants' explanation, properly held that the explanation was not credible. Defendants' testimony that they had come to Kankakee after business hours to take a friend to a court date, that they left at 11:00 P.M. to return to Chicago for a funeral, and that they did not suspect the car was stolen, although it bore dealer's license plates and price schedule sticker on the window, was not such as to persuade the court of the innocence of defendants. The trial court was justified in finding defendants guilty.

After preparation of the presentence report, the trial court held a hearing in aggravation and mitigation. At the conclusion of these proceedings, on April 29, 1974, the two defendants were sentenced as we have indicated, and the larger than minimum sentence for Brisbon was justified by reason of serious prior felony convictions. No reversible error appears in the sentencing procedure or the sentence.

From a review of the record in this cause, we concur in defense counsel's conclusion that there is no basis for maintaining an appeal in this court and that a continuation of the appeal would be wholly frivolous and could not possibly succeed. The action of the Circuit Court of Kankakee County is, therefore, affirmed, and the motion of the State Appellate Defender to withdraw as counsel for defendants Henry Brisbon and Michael Lampkin is allowed.

Judgment affirmed and
withdrawal motion allowed.

261.A. 272

(24540—4/A—9-70) 160-o

COURT REPORTER 2

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE FREDERICK S. GREEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 20th day
of March A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 12714

Agenda 75-61

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from
	)	Circuit Court
EDDIE GUESS,	)	Sangamon County
	)	882-73
Defendant-Appellant)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

The defendant was convicted of the offense of armed robbery upon his plea of guilty. Pursuant to plea negotiations, a sentence of not less than 4 nor more than 8 years in the Illinois State Penitentiary was imposed. The defendant appeals. The State appellate defender was appointed counsel for the defendant-appellant and counsel has filed a motion to withdraw and appended to the motion is a brief in conformity with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. The proof of service shows service of that brief upon the defendant. He was given leave by this court to file supplemental points and authorities and none have been filed.

In discharge of our responsibility, we have examined the record and from such examination, we conclude that the State appellate



defender is correct and that there are no justiciable issues for review and any review would be frivolous.

The indictment in this case is in the language of the statute and charges the offense of armed robbery. The defendant with counsel made a motion to withdraw his plea of not guilty for purposes of entering a plea of guilty. The trial court fully complied with the requirements of Supreme Court Rule 402 (Ill. Rev. Stat. 1973, ch. 110A, § 402). The terms of the plea negotiation agreement were stated to the court; he ascertained a concurrence in the plea agreement by the defendant; and the court imposed the sentence as negotiated.

Since we find nothing in this record that would constitute a meritorious grounds of appeal, the motion to withdraw should be, and the same is, allowed and the conviction and sentence imposed are affirmed.

JUDGMENT AFFIRMED.

SIMKINS, P.J., and GREEN, J., concur.

20
231.A. 318

(24540-4M-9.70) 160-0

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE FREDERICK S. GREEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 20th day
of March A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12420

Agenda No. 74-222

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee)
)
v.)
)
DAVID LEVERTON,)
)
Defendant-Appellant)

Appeal from
Circuit Court
Cass County
No. 73-CF-2

Mr. JUSTICE GREEN delivered the opinion of the court:

Defendant David Leverton was convicted by a jury of the offense of burglary and sentenced to the penitentiary for an indeterminate term with the minimum term fixed at 2 years and the maximum at 6 years. On appeal he contends that because of his age, the nature and circumstances of the offense and the more lenient treatment received by the others involved, his sentence should be reduced.

The evidence at the trial was that defendant and two other young men went to a laundromat for the purpose of breaking in. When the defendant began to pry open one of the inside doors the other two departed and returned to an apartment occupied by one of them. Defendant returned to the apartment later carrying keys, a radio, and money, which he claimed to have taken from the laundromat. The radio was placed in the hallway outside of the apartment and one set of keys was given to the young men. None of the others were charged. The report of the presentence

investigation was the only matter presented to the court at the hearing in aggravation and mitigation. This stated that the defendant was 18 years of age and had been convicted of criminal damage to property on a charge reduced from burglary and placed on probation shortly before the burglary in question. Prior to that, as a juvenile, he had been declared delinquent, committed to the Department of Corrections, escaped, caught, returned to the Department, paroled and had his parole revoked.

The authority to reduce sentences "should be applied with considerable caution and circumspection for the trial judge ordinarily has a superior opportunity in the course of the trial and the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed than do appellate tribunals." People v. Taylor, 33 Ill.2d 417,424, 211 N.E.2d 673,677.

The possible imprisonment for the Class 2 felony offense of burglary is a maximum term of not over 20 years and a minimum term of not less than 1 year and not more than one-third of the maximum term. (Ill.Rev.Stat.1973, ch. 38, par. 1005-8-1(b)(3) and (c)(3).) Defendant had a record of severe incorrigibility. His involvement in the burglary was much greater than that of the others and no showing was made that their prior misconduct was as extensive as his. The sentence was well within the discretion of the trial judge and is affirmed.

AFFIRMED.

SINKINS, P.J., and CRAVEN, J., concur. ~

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE FREDERICK S. GREEN, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 20th day
of March A. D. 19 75, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12515

Agenda No. 74-224

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
v.	)	Logan County
	)	73-CF-37
JAMES FLETCHER O'DELL,)	
)	
Defendant-Appellant)	

Mr. JUSTICE GREEN delivered the opinion of the court:

In 1971 defendant was convicted of burglary in Sangamon County and placed on probation. While a motion to revoke that probation was pending, he entered a negotiated plea of guilty in Logan County to another burglary and was sentenced to imprisonment with a minimum term of 1 year and a maximum term of 3 years. He appeals from the Logan County conviction claiming that the trial judge violated Supreme Court Rule 402 (Ill.Rev.Stat.1973, ch. 110A, par. 402) in accepting his plea without first informing him that the plea would also subject him to the possibility of additional imprisonment as an automatic violation of probation.

The recent case of People v. Warship, 59 Ill.2d 125, 319 N.E. 2d 507, disposes of this contention. There a defendant also pleaded guilty to burglary while a motion to revoke probation on other charges was pending and the same argument was made. In affirming the conviction, the court stated:

"The rule does not require that the defendant be admonished that his probation on a prior conviction may be revoked as a consequence of his plea of guilty. Revocation of probation is a collateral consequence of a plea of guilty and the defendant need not be admonished as to all of the collateral consequences of his plea. (Cuthrell v. Director, Patuxent Institution (4th Cir. 1973), 475 F.2d 1364.)" (59 Ill.2d at 128, 319 N.E.2d at 509.)

The judgment appealed from is affirmed.

AFFIRMED.

SIMKINS, P.J., and CRAVEN, J., concur.

267-1-320

(24540-4M-9-70) 160-0

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE FREDERICK S. GREEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 20th day
of March A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 12663

Agenda No. 74-246

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from
	)	Circuit Court
JAMES COX,	)	Macon County
	)	71-CF-133
Defendant-Appellant.)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

The defendant was convicted of burglary and placed on probation. A petition was filed for revocation of probation, probation was revoked, and on March 7, 1974, the defendant was sentenced to not less than 1-1/2 years nor more than 20 years to the Illinois State Penitentiary. The order of the trial court purported to deny the defendant credit for time served on probation. This appeal is from that order and the sole issue is whether the defendant is entitled to credit for time that he had served on probation. The defendant has filed a brief and the People have filed a confession of error indicating that there is no objection to an order remanding this cause to the circuit court for purposes of calculation of a sentence reflecting credit for time served

on probation prior to the issuance of the warrant for arrest. The confession of error is approved and this cause is remanded to the circuit court of Macon County with directions to calculate the time served on probation, to give the defendant credit for that time, and to issue an amended mittimus reflecting credit for the time served on probation.

AFFIRMED AND REMANDED WITH DIRECTIONS.

SIMKINS, P.J., and GREEN, J., concur.

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On March 25, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

MAR 25 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

ALICE HILBRUNER,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the
	)	18th Judicial
	)	Circuit, DuPage
MR. METHODI GUIORGUIEV d/b/a	)	County, Illinois.
HAIR REMOVAL CENTER and/or)	
GLORIA GUIORGUIEV,)	
)	
Defendant-Appellant.)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

The defendant appeals claiming error in the trial court's denial of his motion to vacate an adverse ex parte judgment.

On January 10, 1973, plaintiff filed a small claims complaint charging that the defendant owed her \$520 plus costs for unpaid wages. Attached to the complaint was a summons for defendant to appear on February 21, 1973. In his brief, defendant admits receiving the summons and complaint.

The next entry of record indicates that on March 28, 1973, plaintiff appeared, defendant failed to appear, and a judgment was entered in favor of the plaintiff for \$520 plus costs. An affidavit for garnishment was filed by plaintiff on April 6, 1973, and a summons was issued for defendant and garnishee to answer on or before April 30, 1973. On April 23, 1973, prior to the return date, the trial court entered a garnishment judgment against defendant and garnishee (Michigan Avenue National Bank) in the sum of \$543.

On April 26, 1973, defendant filed a notice of motion for an order vacating the original ex parte judgment. Proper notice for hearing was given plaintiff and the cause was continued until May 1, 1973. Along with his motion, defendant filed the affidavits of his attorney and his attorney's secretary; these stand uncontradicted.

The attorney's affidavit states that he had filed an appearance on February 21, 1973; that the cause was set for trial on February 28, 1973; that it was continued until March 28, 1973; and that due to the fact that certain relevant documents were not in Illinois, the attorney sent plaintiff a notice of motion to continue the cause until May 7, 1973. It further states that the attorney was enroute to London on March 28, 1973; that he had instructed his secretary to obtain a continuance; that the secretary was instructed by the Clerk of the Court that under the circumstances the submission of a proper affidavit would be sufficient for the granting of a continuance; that the secretary submitted the affidavit; that, unknown to the attorney, an ex parte judgment was entered on March 28, 1973, and that defendant has acted diligently, has a meritorious defense and a valid counter-claim.

The affidavit of the attorney's secretary states that in a conversation with the Clerk of the Court, she was informed that, upon submission of an affidavit, a continuance would be granted, and that she did in fact submit the proper affidavits to the Clerk of the Court.

On May 1, 1973, the trial court, after a hearing, denied the defendant's motion to vacate the ex parte judgment entered March 28, 1973.

Defendant appeals on the theory that the trial court abused its discretion by not vacating the default judgment when defendant

filed his motion, supported by affidavits, within 30 days from the entry of the judgment. He relies on Section 50(5) of the Civil Practice Act (Ill. Rev. Stat. 1973, ch. 110, §50(5),) and cases cited thereunder.

Section 50(5) of the Civil Practice Act states:

"The court may in its discretion, before final order, judgment or decree, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order, judgment or decree upon any terms and conditions that shall be reasonable."

This section no longer requires that the relief be sought on the precise grounds that there is a meritorious defense and a reasonable excuse for not having timely filed such defense. "The overriding consideration now is whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits." (People ex rel. Reid v. Adkins, 48 Ill. 2d 402, 406 (1971).) "What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome." Widicus v. Southwestern Elec. Cooperative, 26 Ill. App. 2d 102, 109 (1960); Historical and Practice Notes, S.H.A., ch. 110, §50(5), page 405.

Plaintiff claims hardship in that she has had to wait since September 1972 for her wages. Balanced against this is defendant's claim that he has a meritorious defense, that delay was necessitated by his need for certain documents, and that neglect of defense counsel in failing to appear was doubtful in light of the secretary's affidavit which states that she communicated by affidavit the defense counsel's position to the Clerk of the Court who stated that a continuance would be granted.

Under these circumstances, no particular hardship or prejudice arises in requiring the plaintiff to have the matter determined

on the merits. We therefore find, under the circumstances, that substantial justice will be done by vacating the ex parte judgment and remanding the cause for an adversary hearing. See also Knight v. Kenilworth Ins. Co., 2 Ill. App. 3d 493 (1971); Belline v. Italia, 133 Ill. App. 2d 400 (1971).

Judgment reversed and cause remanded

RECHENMACHER, P.J. and DIXON, J. - concur

74-110

30
201A. 338
OCT 1 1988
UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On March 24, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED

MAR 21 1975

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) Appeal from the 18th
) Judicial Circuit,
v.)
) DuPage County, Illinois.
TOLMY JOE JONES,)
)
Defendant-Appellant.)

MR. Justice Guild delivered the opinion of the court.

The defendant herein, charged with theft over \$150, entered into a negotiated plea of guilty and was sentenced to a term of 2-6 years in the Illinois State Penitentiary.

The sole question presented in this case is whether the trial court committed reversible error when it did not determine whether the defendant's negotiated plea of guilty was entered voluntarily. Supreme Court Rule 402(b) (Ill.Rev.Stat. 1971, Ch. 110A, sec. 402(b)) provides that the court shall determine whether the plea agreement was entered into voluntarily and shall determine whether any force or threats or any promises apart from the plea agreement were used to obtain the plea.

The trial court complied with Supreme Court Rule 402(a) and (c) but did not, however, inquire into the voluntariness of the plea. Defendant waived a hearing in aggravation and mitigation. Upon express inquiry by the court defendant stated that he was satisfied with the plea agreement. At no point does defendant contend that his negotiated plea was not voluntary or that he was prejudiced in any way by the failure of the court to question him as to the voluntariness.

The Supreme Court of Illinois, in People v. Dudley (1974), 58 Ill.2d 57, 316 N.E.2d 773, recently decided this question and

stated:

"It does not follow, however, that the failure to comply with these provisions of Rule 402(b) must result in a reversal of the judgment of conviction. There is no claim that the plea of the defendant, who was represented by counsel, was not voluntary. There is no other claim of harm or prejudice to the defendant. When questioned by the judge the defendant expressed himself as being satisfied with the plea agreement which had been negotiated for him by his attorney, and even now there is no expression of dissatisfaction with the plea agreement's terms." 58 Ill.2d at 60-61, 316 N.E.2d at 774-75.

See also, People v. Krantz (1974), 58 Ill.2d 187, 317 N.E.2d 559.

In the case before us the identical situation exists. We affirm the conviction of the defendant.

AFFIRMED.

Seidenfeld, P.J. & Hallett, J. concur.

3D
261A. 442



58593

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
LEE BRADFORD,	)	HONORABLE MAURICE W. LEE,
	)	Presiding.
Defendant-Appellant.)	

Mr. PRESIDING JUSTICE EGAN delivered the opinion of the court:

Lee Bradford was found guilty of prostitution after a bench trial (Ill.Rev.Stat. 1971, ch. 38, par. 11-14(a)(2).), and sentenced to a term of six months at the Vandalia State Farm. He contends that the complaint charging him was void and that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

The form complaint, which was not verified, listed R. O'Donnell as the complainant but was signed by D. Sokolnicki above the line marked for the "Complainant's Signature." The charging part of the complaint alleged that the defendant agreed to perform an act of deviate sexual conduct with R. O'Donnell.

The Criminal Code enacted in 1963 provides that "(a)n indictment shall be signed by the foreman of the Grand Jury" and "(a) complaint shall be sworn to and signed by the complainant." (Ill. Rev.Stat. 1971, ch. 38, sec. 111-3(b).) The Committee Comments indicate that the Code was drafted to reflect a more liberal attitude toward pleading requirements than in the past. In People v. Harding, 34 Ill.2d 475, 483, 216 N.E.2d 147, the court held that a complaint not verified did not affect the jurisdiction of the court and that the right to be charged by a verified complaint can be waived. Similarly, in People v. Wilson, 7 Ill.App.3d 153, 237 N.E.2d 211, it was held that the failure to move to quash an indictment not signed by the Grand Jury foreman waived any defect.

In this case, the Assistant Public Defender assigned to the courtroom was appointed to represent the defendant when the case was called. Officer Robert O'Donnell was the only witness for the State. On cross-examination the first questions asked and the answers given were as follows:

"Q. Officer O'Donnell, did you sign the complaint on this?

"A. Officer Sokolnicki did.

"Q. When did you first observe the defendant?

"A. At the curb at 4450 North Broadway."

At that point the following occurred:

"Public Defender: Your Honor, in this case, if he didn't sign the complaint --

"The Court: The complaining witness is only a witness and has nothing to do with the facts. It is merely a method of instituting a proceeding.

He need not be there. Any competent witness can testify. If this be a motion, your motion is denied."

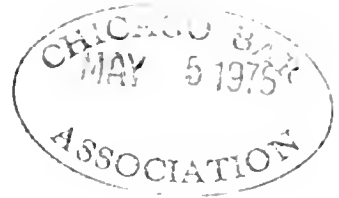
Under the circumstances disclosed by this record we conclude that the defendant did not waive the defects in the complaint. The judgment is reversed.

JUDGMENT REVERSED.

BURKE, J. and GOLDBERG, J. concur.

ABSTRACT ONLY.

361A. 485



60232

LEE ARTOE,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
BELL OIL COMPANY, et al.,	)	HON. SAMUEL SHAMBERG,
	)	Presiding.
Defendants-Appellees.)	

PER CURIAM: (FIRST DISTRICT, FIRST DIVISION)

Before Burke, P. J., Goldberg and Simon, J.J.

On October 6, 1972, plaintiff, Lee Artoe, filed an amended complaint in the circuit court of Cook County seeking \$3500 for damages allegedly caused when the defendant, Bell Oil Company, carelessly delivered fuel oil so that it overflowed and flooded certain premises owned by plaintiff. On January 15, 1973, the complaint was dismissed for want of prosecution when plaintiff failed to appear. On February 15, 1973, 31 days thereafter, plaintiff moved to vacate the dismissal order. The case was continued until March 15, 1973, at which time the motion to vacate was treated as one under section 50(5) of the Civil Practice Act and denied because it was not filed within 30 days. (Ill. Rev. Stat. 1973, ch. 110, par. 50(5).) No appeal was taken from this order. On November 28, 1973, plaintiff filed a written motion to vacate the dismissal order under the provisions of section 72 of the Illinois Civil Practice Act. (Ill. Rev. Stat. 1973, ch. 110, par. 72.) The motion was supported by an affidavit and a written brief and sought relief on the grounds that the case was "missed" on the regular trial call on January 15, 1973, and that "due to error of not allowing the extra day of January 31,***" the motion to vacate was filed on the 31st day instead of within the 30 days as required. On January 25, 1974, the petition was denied and plaintiff has brought this appeal.

Plaintiff contends that relief under section 72 should have been granted because his failure to appear at the call on January 15, 1973, was not due to abandonment of the cause of action or due to disinterest. He contends further that the circumstances presented to the trial court were such that, in the interest of justice and fairness, the previous dismissal order of January 15, 1973, should have been vacated. For example, in his brief he states that 36 hearings were held in the case prior to dismissal. In addition, plaintiff contends that on January 31, 1973, a motion was made to vacate the dismissal order and that on this date the court file was missing. These assertions in the brief, however, are not supported by the record plaintiff has brought to this court.

It is an elementary principle of appellate practice, as the court stated recently in LaPierre v. Oak Park Fed. S. & L. Ass'n., 21 Ill. App. 3d 541, 546, 315 N.E.2d 908, that "a party who brings a cause to a reviewing court must present in the record the proceedings to show the error complained of." Otherwise, the reviewing court presumes that the evidence supported the decision of the trial court. (Silverstein v. Grellner, 15 Ill. App. 3d 695, 304 N.E.2d 727.) This record does contain a "proposed" report of proceedings for January 25, 1974, but the document is not certified by the trial judge as required by Supreme Court Rule 323(c). (50 Ill. 2d R. 323(c).) A somewhat similar situation was involved in Silverstein, where the appellant contended that the trial court was required to "settle and certify" some report of proceedings, when a proposed report of proceedings was presented to him. The reviewing court held, however, that a trial judge need not certify the proposed report of proceedings unless it accurately reflects what occurred before the court during the trial of the case, and concluded that the proper remedy upon an improper refusal to certify a proposed report would have been a writ of mandamus. Therefore, under the circumstances presented by this record, we think

the proper presumption is that the trial court would have certified the proposed report of proceedings if it did accurately reflect what occurred before the court.

However, even if we were to accept the appellant's proposed report of proceedings, it is of no help to his position in this court. The proposed report of proceedings merely states that on January 25, 1974, the parties appeared before Judge Shamberg, the plaintiff presented his brief and a \$10 receipt from the clerk's office for filing the section 72 petition, the court took judicial notice of all documents in the file, the defendant filed no answer or brief, the court discussed the decision of Gary Acceptance Corp. v. Napilillo, 86 Ill. App. 2d 257, 230 N.E.2d 73, and ruled as set forth in the written court order. If we assume this to be an accurate report of the proceedings before Judge Shamberg on January 25, 1974, it shows only that the court heard no evidence on January 25, 1974.

As in other civil cases, the moving party under section 72, here the plaintiff, must allege and prove a right to the relief he seeks. For example, in Esczuk v. Chicago Transit Authority, 39 Ill. 2d 464, 467, 236 N.E.2d 719, the Supreme Court said, "The burden is upon the petitioner under section 72 to allege and prove the facts justifying relief." Therefore, the burden was upon the plaintiff to present any evidence he had to the court on January 25, 1974. According to his own proposed report of proceedings, he did not do so.

Apart from any evidence presented on January 25, 1974, we do not believe that the facts alleged by plaintiff justify relief under section 72. Reading the section 72 petition, the accompanying affidavit, and plaintiff's trial brief, we find that plaintiff merely states that the cause of action was "missed by Plaintiff on regular trial call" on January 15, 1973, that his attorney filed a motion to vacate but mistakenly filed it on the 31st instead of on the 30th day or earlier.

The record is silent as to what, if anything, plaintiff did to protect his rights between March 15, 1973, when the first motion to vacate was denied, and November 28, 1973, when he filed his section 72 motion. From all that appears in this record, plaintiff did nothing for nearly eight and one half months.

The plaintiff points out that there are circumstances under which section 72 relief may be granted even when there is no showing of due diligence. For example, in Gary Acceptance Corp. v. Napilillo, 86 Ill. App. 2d 257, 262, 230 N.E.2d 73, cited by plaintiff both in the trial court and in this court, the court stated:

When it is clear from all the circumstances that a party has procured an unconscionable advantage through the extraordinary use of a court process, the court will excuse the defaulting party for what might otherwise be considered a lack of diligence. In such situations the ends of justice are best served by a contested hearing on the merits.

The situation before the court in Gary Acceptance Corp. concerned a section 72 petition to vacate a default judgment obtained by a creditor against a debtor when the creditor knew that the debt had been discharged in bankruptcy. Thus, although the requirement of due diligence by the party seeking relief may be relaxed when equity and good conscience so require, such application must be determined on a case-by-case basis. For example, in Kukuk v. Checker Taxi Co., 13 Ill. App. 3d 5, 299 N.E.2d 468, the court reversed a trial court's grant of relief under section 72 under circumstances where the original dismissal was entered for failure of the plaintiffs to answer interrogatories in accordance with orders of the court. In the case at bar, the petitioner has not alleged facts showing due diligence and he has not alleged, in any manner, that he has a meritorious cause of action. No facts are alleged to show why some eight and one half months passed until section 72

relief was sought. Under these circumstances, where the record does not show that plaintiff alleged facts justifying the section 72 relief he sought, the trial court was therefore correct in denying the motion to vacate. (Johnson v. Hawkins, 4 Ill. App. 3d 29, 33, 280 N.E.2d 291.) Therefore, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

(Abstract Only)



59659

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
RONALD FILLYAW,	)	HON. KENNETH R. WENDT,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM: (FIRST DISTRICT, FIRST DIVISION)
Before Burke, P. J., Goldberg and Simon, J.J.

Ronald Fillyaw, defendant, was found guilty after a bench trial of the crime of armed robbery in violation of section 18-2 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 18-2.) He was sentenced to a term of four to twelve years. He appeals.

At trial, Elise Searcy testified that on March 18, 1972, at approximately 10:00 P. M., she and her sister went to George's Rib House in Harvey, Illinois. While her sister went to place their order, Miss Searcy remained in the car. The driver's door to the vehicle suddenly opened and two men, one of whom held a shotgun, entered the car and ordered Miss Searcy out of the vehicle. The men took her purse, money and the car. Several hours later Miss Searcy viewed a lineup of five men at the Robbins Police Station. At that time she identified the defendant as one of the men who had robbed her. At trial, Miss Searcy again identified the defendant as one of the men who had robbed her.

On cross-examination, Miss Searcy testified that during the robbery she did not see the defendant face-to-face but identified him only by his clothing and knowing that he had dark skin and a large natural hairstyle. Miss Searcy admitted that prior to viewing the lineup she was told by the police that all of the people in the lineup had been found in her car which was taken in the robbery. Miss Searcy also admitted that some of the men in the lineup did not resemble the description she had given of the robbers.

On redirect examination, Miss Searcy testified that prior to the incident in question she had seen the defendant in the neighborhood on several occasions but did not know his name. She stated that the last time she observed the defendant was several months prior to the occurrence.

On recross-examination, Miss Searcy testified that prior to the lineup she told the police that she had a problem identifying the defendant because she did not see him face-to-face during the robbery. She again stated that she saw only his clothing and knew that he had dark skin and a large natural hairstyle. Further, she stated that she was not positive that the man she had seen prior to the incident was the defendant.

Kenneth Collins, a Robbins police officer, testified that on March 18, 1972, he and his partner observed the car which had been stolen from Miss Searcy pull into the driveway at 13521 St. Louis, Robbins, Illinois. At that time, the defendant and four other people got out of the car and entered the house. After radioing for help, Officer Collins and his partner entered the house and placed all five occupants under arrest. A sawed-off shotgun was recovered from the vehicle.

Defendant testified that between 8:30 P. M. and 11:30 P. M., on March 18, 1972, he was at a party. He left the party with Diane McKinney and proceeded to her house. Shortly thereafter, police officers entered the house and placed all the occupants under arrest.

Niomi McKinney, Diane McKinney and Coreen Wylie testified that on March 18, 1972, between 8:30 P. M. and 11:30 P. M., defendant was attending a party in Robbins, Illinois.

While defendant on appeal argues several points for a determination of this cause, we deem it necessary to consider only defendant's argument that the evidence was insufficient to establish

his guilt beyond a reasonable doubt. The rule is well established that the identification testimony of one witness which is positive and credible is sufficient to convict, even though that testimony is contradicted by the accused. (People v. Novotny, 41 Ill. 2d 401, 411, 244 N.E.2d 182.) However, such a conviction cannot stand if the identification testimony is vague, doubtful and uncertain. People v. King, 10 Ill. App. 3d 652, 295 N.E.2d 258.

In the case at bar, Miss Searcy's testimony was the crux of the State's case. She was the only witness to directly connect the defendant to the robbery. At trial, Miss Searcy testified that during the robbery she was not able to view the defendant face-to-face. She admitted that she identified the defendant in the lineup only on the basis of his clothing and the fact that he had dark skin and a large natural hairstyle. Prior to viewing the lineup, she was informed by the police that all of the men she would view in the lineup were found in her car which had been taken in the robbery. She also admitted that some of the men in the lineup did not meet the description of the robbers in any fashion. The State, on redirect examination, brought out the fact that Miss Searcy had seen the defendant on several occasions prior to the incident in question. However, on recross-examination, she admitted that the man that she had seen on prior occasions may, in fact, not have been the defendant. She again reiterated that she did not view the defendant face-to-face during the robbery and identified him only on the basis of his clothing and the fact that he had dark skin and a large natural hairstyle. After a careful review of the entire record, we conclude that Miss Searcy's testimony was doubtful, uncertain and insufficient to establish defendant's guilt beyond a reasonable doubt.

Accordingly, the judgment of the circuit court of Cook County is reversed.

JUDGMENT REVERSED.

3D
261.A. 401



60522

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.)	
	)	HON. MINOR K. WILSON,
CHARLES F. ALLISON,	)	Presiding
)	
Petitioner-Appellant.)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Burke, P.J., Goldberg and Egan, JJ.

Charles F. Allison, petitioner, appeals from an order dismissing without an evidentiary hearing his post-conviction petition filed pursuant to the Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq).

On October 23, 1969, petitioner entered a plea of guilty to an indictment charging him with indecent liberties with a child and was sentenced to a term of four to eight years. Petitioner did not appeal. On December 29, 1972, petitioner filed a pro se post-conviction petition. Thereafter, counsel was appointed to represent him and on October 22, 1973, a supplemental post-conviction petition was filed. On October 31, 1973, upon motion of the State, petitioner's post-conviction petition was dismissed without an evidentiary hearing.

Petitioner wished to appeal from the dismissal of his post-conviction petition and the Public Defender of Cook County was appointed to represent him. After examining the record the Public Defender filed a motion in this court for leave to withdraw as appellate counsel pursuant to the requirements set out in Anders v. California, 386 U.S. 738. A brief in support of the motion has also been filed. The brief concludes that an appeal in this case would be wholly frivolous and without merit. Petitioner was mailed copies of the motion and brief on November 8, 1974. He was informed that he had until January 15, 1975, to file any additional



points he might choose in support of his appeal. He has not responded.

The brief of the Public Defender states that the only possible argument which could be raised on appeal is whether petitioner was entitled to an evidentiary hearing on the allegation in his post-conviction petition that the trial judge did not properly admonish him in accepting his plea of guilty. The Supreme Court rule governing pleas of guilty at the time petitioner entered his plea in 1969 was Rule 401(b). (Ill. Rev. Stat. 1969, ch. 110A, par. 401(b).) This rule required that a defendant be informed of the consequences of his plea and of the maximum and minimum possible penalties provided by law. People v. Castillo, 130 Ill. App. 2d 329, 264 N.E.2d 395.

In the case at bar, the transcript of petitioner's plea of guilty demonstrates that when petitioner's case was called, defense counsel informed the trial judge that petitioner wished to enter a plea of guilty. The trial judge then advised petitioner that he was charged with the crime of indecent liberties with a child. The trial judge then carefully informed the petitioner of each of the individual elements comprising that charge and advised him that the State would have to prove each of these elements beyond a reasonable doubt. Petitioner stated that he understood the nature of the charge. Petitioner was advised as to the possible maximum and minimum penalties of the charge. The trial judge admonished petitioner that by entering a plea of guilty he would waive the right to confront the witnesses against him, his right to a trial by jury and his right against self-incrimination. Petitioner stated that he was entering his plea of guilty voluntarily and that no threats, promises or coercion had been used to induce him to enter the plea. The facts which provided a basis for the indictment were then stipulated to by the parties. Petitioner's plea of guilty was then accepted by the trial court. These admonitions by the trial

judge were sufficient to comply with Supreme Court Rule 401(b).
People v. Carrion, 21 Ill. App. 3d 195, 315 N.E.2d 251.

We have noted that petitioner in his supplemental post-conviction petition argued that he was not examined by two psychiatrists pursuant to the provisions of Ill. Rev. Stat. 1969, ch. 23, par. 2402. At the hearing on the State's motion to dismiss, it was revealed that petitioner was examined by one psychiatrist and found competent to stand trial. However, the failure to comply with this statute under circumstances similar to those in the case at bar has been held to be insufficient to raise an issue of constitutional dimensions under the Post-Conviction Hearing Act. People v. Hedenberg, 9 Ill. App. 3d 597, 291 N.E.2d 848.

We have examined the record and concur in the opinion of the Public Defender of Cook County that the argument thus raised does not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED; JUDGMENT AFFIRMED.

261A. 492/



59031

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
JOSHUA TRAVIS a/k/a THOMAS	)	HONORABLE
McCARROLL,	)	THOMAS P. CAWLEY,
	)	PRESIDING.
Defendant-Appellant.)	

Before Stamos, Leighton and Hayes, JJ.

PER CURIAM:

Joshua Travis a/k/a Thomas McCarroll, defendant, was found guilty after a bench trial of the crime of theft. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). He was sentenced to a term of ninety days in the House of Correction.

Defendant appeals, arguing that it was error for the trial judge to deny defense counsel's request for a continuance and that he did not knowingly and understandingly waive his right to a trial by jury. Since defendant does not challenge the sufficiency of the evidence against him, a detailed recitation of facts is unnecessary.

Defendant's first contention on appeal is that the trial court improperly denied defense counsel's motion for a continuance. The record reflects that defendant was arrested on August 25, 1972, and charged with the crime of theft. Defendant posted bond and was ordered to appear for trial on September 8, 1972. Defendant failed to appear on that date and a warrant was issued for his arrest. The warrant was executed and the defendant subsequently appeared in court on October 7, 1972. Thereafter, the case was continued on motion of the State until October 27, 1972. On that date defendant appeared and moved for a continuance which was granted. On November 20, 1972, when defendant's case was called, the defendant answered ready for trial. The trial judge stated he

had observed that privately retained defense counsel had just entered the courtroom and asked if counsel wished to have the court pass the case. Defense counsel informed the court that he was thinking of a continuance. The trial judge stated it was a rather old case and he was of a mind to deny a continuance. The trial judge suggested that counsel converse with his client and declared a recess in the case. When the case was recalled, defense counsel stated that he was not ready to proceed with trial and requested a continuance. The trial judge, after reviewing the history of the case, denied counsel's motion for a continuance and informed counsel that he would have to proceed with trial. Thereafter, the court again declared a recess for counsel to consult with his client. When the case was recalled, the trial proceeded.

The rule is well established that motions for continuance are addressed to the discretion of the trial court. People v. Clark, 9 Ill. 2d 46, 137 N.E. 2d 54. A reviewing court will not interfere with the trial court's denial of a defendant's request for a continuance unless the trial court has abused its discretion. People v. Summers, 12 Ill. App. 3d 893, 299 N.E. 2d 462.

In the case at bar, defendant was arrested on August 25, 1972. From that date until the date of trial on November 20, 1972, two of the delays in the case were attributable to the defendant. First, when the defendant failed to appear in court and a warrant was issued for his arrest and, second, when defendant requested and was granted a continuance. Defendant had an adequate opportunity in the three months between his arrest and date of trial to secure trial counsel. Privately retained defense counsel's conduct at trial demonstrates that he was obviously prepared. Counsel effectively cross-examined the complainant who was the State's only witness, presented a

defense, made a closing argument and presented evidence in mitigation. Further, defendant has failed to demonstrate how he was in any way prejudiced. Under these circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a continuance.

Defendant's second contention on appeal is that he did not knowingly and understandingly waive his right to a trial by jury. In People v. Sailor, 43 Ill. 2d 256, 253 N.E. 2d 397, the Supreme Court held that an accused ordinarily speaks through his attorney and that, by permitting his attorney in his presence and without objection to waive the right to a jury trial, a defendant is deemed to have acquiesced and is bound by his attorney's conduct. The court stated that the trial court is entitled to rely upon the professional responsibilities of defense counsel and that a defendant will not be permitted to complain of an alleged error which he has invited by his own behavior and that of his counsel. The rule stated in Sailor has been applied by this court. People v. Morgan, 18 Ill. App. 3d 153, 309 N.E. 2d 331; People v. Irving, 15 Ill. App. 3d 563, 304 N.E. 2d 655; People v. McClinton, 4 Ill. App. 3d 253, 280 N.E. 2d 795.

In the case at bar, the record reflects that at trial defendant was represented by privately retained counsel with whom he had conferred. When the case was called for trial, the trial judge specifically asked if defendant wished to be tried by the court or by a jury. Defense counsel, in defendant's presence, replied "By the court". Defendant's conduct in permitting his attorney in his presence and without any objection to waive the right to a trial by jury constitutes a valid jury waiver.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

37
261A. 669



60114

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
WILLIAM CLINTON,	)	HONORABLE
	)	MARK JONES,
Defendant-Appellant.	)	JUDGE PRESIDING.

Before BARRETT, P.J., DRUCKER, J., and LORENZ, J.

PER CURIAM, First District, Fifth Division.

Defendant was found guilty after a bench trial of battery and criminal damage to property. (Ill. Rev. Stat. 1973, ch. 38, par. 12-3, 21-1(a).) He was sentenced to a term of 45 days on the battery conviction and fined \$10 on the conviction of criminal damage to property. On appeal, defendant argues that he did not knowingly and understandingly waive his right to trial by jury.

The record reflects that defendant was represented by the assistant public defender. When defendant's case was called, the assistant public defender stated, "The defense is ready for trial." The defendant wishes to enter a plea of not guilty and be tried by this court."

Defendant now urges that the statement of the assistant public defender indicating defendant's desire for a bench trial was insufficient to demonstrate that defendant knowingly and understandingly waived his right to a trial by jury.

Currently, there is no specific formula for determining whether a defendant has knowingly and understandingly waived his right to trial by jury. (People v. Richardson, 32 Ill.2d 497, 207 N.E.2d 453.) The disposition of each case depends

upon the particular facts and circumstances of that case.

(People v. Wesley, 30 Ill.2d 131, 195 N.E.2d 708.) However, a lengthy explanation of the consequences of the jury waiver is not a prerequisite of the validity of that waiver. People v. Bradley, 131 Ill.App.2d 91, 266 N.E.2d 469.

Where defense counsel expressly advises the court that a jury is waived in defendant's presence and without any objection by the defendant, the defendant is held to have acquiesced to and is bound by the action of his counsel. (People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397.) In the instant case, defendant seeks to avoid Sailor by relying upon the decisions in People v. Baker, 126 Ill.App.2d 1, 262 N.E.2d 7, and People v. Boyd, 5 Ill.App.3d 980, 284 N.E.2d 699. In both of those cases, a jury waiver made by counsel appointed at the time of trial was held to be invalid because the record did not indicate that appointed counsel had an adequate opportunity to confer with the defendant.

In the case at bar, the record does not indicate when the public defender was appointed to represent defendant. However, the record does affirmatively demonstrate that the case was ably and adequately tried by defense counsel. Defense counsel cross-examined each of the state's witnesses in an intelligent manner which demonstrated a familiarity with the facts of the case. Defense counsel presented a defense, made an extensive closing argument and actively participated in the hearing in aggravation and mitigation. Defense counsel throughout the entire trial displayed a familiarity with the facts of the case and at all times adequately represented defendant. We conclude, therefore, that able counsel acted with the full acquiescence and consent of his silent client when he told the trial court that the jury would be waived. (People v. Gray, 14 Ill.

App.3d 1022, 304 N.E.2d 111, People v. Gay, 4 Ill.App.3d 652, 281 N.E.2d 738.) Defendant's action in permitting his attorney in his presence and without any objection to waive his right to a jury trial and enter a plea of not guilty, constitutes a valid jury waiver, binding upon defendant.

For the reasons stated above, the judgment of the trial court is affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.

3D
261A, 685



60490

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
DAVID LAWRENCE,	)	HONORABLE
	)	MEL R. JIGANTI,
Petitioner-Appellant.	)	JUDGE PRESIDING.

Before BARRETT, P.J., DRUCKER, J. and LORENZ, J.

PER CURIAM, First District, Fifth Division.

On August 15, 1968, petitioner pleaded guilty to murder and did not appeal his conviction. Four years thereafter he filed a pro se post-conviction petition. The Public Defender was appointed to represent him and filed a supplemental petition pursuant to the Post-Conviction Hearing Act. (Ill. Rev. Stat. 1971, ch. 38, pars. 122-1 et seq.) This petition was denied without an evidentiary hearing. Petitioner has appealed.

After examining the record, the Public Defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief concludes that an appeal in this case would be frivolous and without merit. Defendant was mailed copies of the motion and brief on September 12, 1974. He was informed he had until November 11, 1974, to file any additional points he might choose in support of his appeal. He has not responded.

The motion and brief of the Public Defender allege that one possible argument that could be raised on appeal is that the trial court failed to sufficiently admonish petitioner prior to his plea of guilty. The plea of guilty in the case at bar was entered on August 15, 1968. Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402), is not applicable,

because it did not become effective until September 1, 1970, and will not be given retroactive effect. (People v. Nardi, 48 Ill.2d 111, 268 N.E.2d 389.) Therefore, former Rule 401(b), which required that a defendant understand "the nature of the charge against him, and the consequences thereof if found guilty" would govern the plea of guilty in the case at bar. (Ill. Rev. Stat. 1967, ch. 110A, par. 401.) When petitioner changed his plea from not guilty to guilty, he was represented by counsel. On interrogation by his counsel, petitioner stated he entered his plea of guilty voluntarily and understood that thereby he was waiving his right to a jury trial; and that he was doing this without threats, coercion or promises. By interrogation of the trial court, petitioner stated he knew that if he pleaded guilty he would automatically waive his right to a jury trial; that he knew what a jury trial is; that he knew if he pleaded guilty to the offense of murder, he might be sentenced to death or an imprisonment in the penitentiary for an indeterminate term with a minimum of not less than 14 years and as long as the rest of his life; and that he still persisted in pleading guilty to the indictment as charged. Counsel stipulated to testimony that could have been given and that the facts and allegations contained in both counts of the indictment are true, correct, and sufficient to support a finding of guilty on both counts.

Under the provisions of Rule 401(b) in effect at the time petitioner pleaded guilty, he was adequately admonished.

(People v. Harris, 50 Ill.2d 31, 276 N.E.2d 327.) The record is sufficient to show that petitioner knowingly and voluntarily pleaded guilty to the offense of murder. People v. Barber, 51 Ill.2d 268, 270, 281 N.E.2d 676.

The Public Defender states that a second possible ground for appeal might be that petitioner was denied equal protection



of the laws, since he allegedly was deprived of the benefits of the Juvenile Court Act and was subjected to the jurisdiction of the Criminal division of the circuit court. Subsequent to the instant post-conviction hearing, the Supreme Court held that section 2-7(1) of the Juvenile Court Act (Ill. Rev. Stat. 1971, ch. 37, par. 702-7(1)), was unconstitutional. (People v. Ellis, 57 Ill.2d 127, 311 N.E.2d 98.) The court concluded, however, that the failure to consider a male who was 17 years old at the time of the offense as a minor under the provisions of the Act did not deprive him of equal protection of the laws. (57 Ill.2d at 134.) This decision is applicable to the instant petitioner, who was 17 years old at the time of the offense.

A further possible ground for appeal pertains to a statement filed by co-defendant Henry Byers on September 30, 1973, in which he stated that he and petitioner had a discussion about whether petitioner was present in the room where the crime occurred and "that [petitioner] was not present in the room where the alleged crime occurred but was in another part of the Y.M.C.A. on that night." At the post-conviction hearing, counsel for petitioner argued that this statement should be given consideration along with his argument pertaining to petitioner's guilty plea and the stipulation of facts. However, a voluntary plea of guilty waives the right to introduce evidence of witnesses. (People v. Myers, 52 Ill.2d 258, 287 N.E.2d 672.) Any evidence, including the affidavit of co-defendant Byers does not present a constitutional issue and thus may not be considered under the Illinois Post-Conviction Hearing Act. People v. Williams, 52 Ill.2d 466, 288 N.E.2d 353.

We have examined the record and concur in the opinion of the Public Defender that the points raised in the petition are not arguable on their merits and that this appeal is wholly frivolous. An examination of the record does not disclose any



additional possible grounds for an appeal which are not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal, and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.

3D
261A. 886



No. 60538

FREDERICK HERRSCHNER,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
)	
v.)	
)	
XTTRIUM LABORATORIES, INC.,	)	HONORABLE
	)	FRANCIS T. DELANEY
Defendant-Appellant.)	)	PRESIDING

Before Drucker, J., Lorenz, J. and Sullivan, J.

PER CURIAM: (First District, Fifth Division)

Plaintiff commenced this action for an accounting and the recovery of damages occasioned by the alleged breach of an employment contract. Judgment was entered for plaintiff in the amount of \$6,000 on his motion for summary judgment. Defendant appeals, contending the trial court erred in entering summary judgment since several triable issues of material fact were raised by the pleadings and other documents filed in the case.

The complaint alleged that on April 15, 1968, plaintiff and defendant entered into a written contract whereby plaintiff agreed to perform catalog and merchandising consultation services for defendant's wholly-owned subsidiary, the Blue Ridge Vitamin Company; the period of service was to commence July 1, 1968, and to end June 30, 1969; a stated fee of \$6,000 was agreed upon, payable in twelve monthly installments, as well as an additional fee contingent upon the company's profits, as determined by a schedule set out in the contract. The complaint further alleged that after June 30, 1969, plaintiff continued, uninterruptedly, to perform the services as set out in the written contract, for which defendant paid him \$1,500 quarterly; that the contract was thereby renewed from year to year by the actions of the parties; that from July 1, 1972 to July 24, 1972, when defendant improperly discharged him, plaintiff had continued to perform the same services which were accepted by defendant to its benefit, thereby renewing the contract for the period from July 1,



1972 to June 30, 1973; that the \$1,500 quarterly payments to plaintiff continued until July 1, 1972, after which defendant refused to make the quarterly payments and arbitrarily and capriciously refused to acknowledge the extension of the contract from July 1, 1972 to June 30, 1973 on the same terms as before; and that defendant had made no accounting to plaintiff of the company profits, as required by the contract. The complaint asked that the court declare the contract extended from July 1, 1972 to June 30, 1973; that plaintiff have judgment for \$6,000 for that period; that defendant be required to account for profits from July 1, 1968; and that plaintiff have judgment in the amount found to be due based upon the profits.

The answer of defendant admitted the existence of the written contract and the payment to plaintiff of the \$1,500 quarterly payments after the expiration of the contract and until June 30, 1972. The answer denied all other allegations in the complaint. By way of affirmative defense, it was asserted that the written contract expired by its own terms on June 30, 1969; that prior to July 1, 1972, defendant had advised plaintiff that his employment would be terminated effective June 30, 1972; and that any services which plaintiff may have rendered to defendant after June 30, 1972 were neither sanctioned nor accepted by defendant. Plaintiff's reply to the affirmative defense alleged a year-to-year renewal of the contract, including the period from July 1, 1972 to June 30, 1973, and consisted of denials of the other matters alleged therein.

On August 10, 1973, plaintiff filed a motion for summary judgment in which the general allegations of his complaint and his reply were restated, as were additional averments that defendant had not provided him with an audit of profits until after the commencement of suit; that plaintiff's independent audit of the company's records demonstrated profits of approximately \$2,450 in each of the years 1969 and 1970; that plaintiff

continued to render his services at defendant's special request; that plaintiff was entitled to \$6,000 for the period July 1, 1972 to June 30, 1973, during which period he was not otherwise gainfully employed; and that the president of defendant had testified at a deposition that the parties' contract had been renewed quarterly but had been orally terminated prior to July 1, 1972. Plaintiff's affidavit was attached to the motion for summary judgment, as was a memorandum of authorities in support of the motion.

The deposition of the president of the defendant, Robert J. Creevy, was also filed in support of plaintiff's motion for summary judgment. It disclosed that the Blue Ridge Vitamin Company was a trade name or product line of defendant, operating as a mail order business; that defendant manufactured pharmaceutical products which were sold to Western Medical, a separate corporation located on defendant's premises; and that Western Medical originally paid plaintiff's salary, which was ultimately charged to defendant. No new contract was entered between plaintiff and defendant upon the expiration of the written contract on June 30, 1969. During the renewal periods, the parties did not continue with the same contract, but an understanding was reached whereby plaintiff would be continued in the defendant's employ under the same contract terms with the need for his continued services reviewed every 90 days, because Blue Ridge had been losing money; his salary was established at \$1,500 quarterly, and he was continued in defendant's employ for 90 day periods until June 30, 1972. During the quarterly period from April 1, 1972 to June 30, 1972, plaintiff's employment was orally terminated; he was told that he was through; plaintiff stated that he would continue to work, and after several weeks defendant decided to retain him for the remainder of that quarterly period for which he had already been paid. Blue Ridge showed a loss of \$26,000 at the end of the first year of operation and a combined



loss of \$93,000 at the end of two years; the witness was not satisfied with plaintiff's performance or his ability to produce, but it was decided that plaintiff would be kept on because the witness believed that business would improve; plaintiff was "not that vital" to Blue Ridge operations. The final paycheck submitted to plaintiff was on April 10, 1972, at which time no definite decision to terminate his employment had been made. However, he was informed during the last week of June, 1972, that his services would be terminated as of June 30, 1972; the witness did not recall plaintiff requesting \$1,500 for the quarter period commencing July 1, 1972; plaintiff had been fired prior to that date. Plaintiff had not entered the witness's office after July 1, 1972, but he may have entered defendant's premises; any service which he performed after July 1, 1972 was contrary to the witness's instructions; on July 24, 1972 plaintiff informed an employee of defendant that he had already consulted with his lawyer and that defendant would be hearing from counsel. This was transmitted to the witness, which led him to conclude that plaintiff understood he had been fired prior to July 1, 1972. The witness identified exhibits attached to the motion for summary judgment as Blue Ridge advertising, catalog and mailing brochures, its financial statement, and matters of that type. He had not seen certain memoranda allegedly submitted by plaintiff to defendant subsequent to June 30, 1972, and he was also questioned concerning correspondence with legal counsel of defendant after the termination of plaintiff's employment.

Defendant's reply to the motion for summary judgment alleged in substance that several triable issues of material fact existed.

After entry of the judgment, defendant filed a post-trial motion, again relating that genuine issues of material fact were raised by the pleadings and other documents on file. In answer thereto, plaintiff alleged that no genuine issues of fact had

been raised and that the "oral termination" of the contract was an afterthought on defendant's part.

OPINION

Defendant contends on appeal that summary judgment was improperly granted, because there are five genuine issues of material fact; namely, whether prior to July 1, 1972 defendant notified plaintiff the contract would not be renewed; whether plaintiff performed services after June 30, 1972; whether defendant accepted and was benefited by those alleged services; whether the contracts from July 1, 1969 to June 30, 1972 were for 90 day periods or for one year periods; if the foregoing issues are found in plaintiff's favor, whether it was terminated prior to July 1, 1972 or on July 24, 1972, the date on which plaintiff admits he received notice of termination; and, if on the later date, whether the termination was justified.

Plaintiff argues no genuine issue of material fact existed since the trial court "evidently concluded" that it was "unreasonable and improbable" that plaintiff continued to perform his contract after June 30, 1969 on a 90 day rather than on a yearly basis; that it was "unreasonable and improbable" that plaintiff, if he had been fired, would continue to perform his usual and customary services after June 30, 1972; that it was "unreasonable and improbable" that such work was not accepted by defendant; that the claim of Mr. Creevy that he did not know of the existence of plaintiff's post-June 30, 1972 memoranda did not necessarily mean that such memoranda were not made; and that defendant is barred from raising the point concerning the justification of the July 24, 1972 termination, because it was not raised in the trial court.

It is settled that summary judgment is not a remedy to be employed to resolve triable issues of material fact and, if such an issue exists, the motion must be denied with the issues left for determination by the trier of fact in the normal course



of the proceedings. The sole function of the trial court in acting upon a motion for summary judgment is a determination of whether a genuine issue of material fact exists, not to resolve the issue. Hendricks v. Deterts (1973), 13 Ill.App.3d 976, 301 N.E.2d 625.

In the instant case, we agree with defendant's contention, as set forth above, that there are triable issues of material fact with regard to the relationship of the parties to the employment contract. Plaintiff argues that such issues were in reality not genuine issues of material fact, because the trial court "evidently concluded" that they arose from "unreasonable and improbable" circumstances. This argument begs the question, since the trial court would necessarily have to hear evidence and resolve the conflicts therein, as highlighted by the positions of the respective parties, before arriving at such conclusion. Specifically, plaintiff's basic argument supporting his contentions on this appeal, that the terms of the original written contract were extended thereafter on a year-to-year basis due to the conduct of the parties, was put squarely into question by defendant's contention that it had been understood that plaintiff's position with the company would be reviewed every quarter in light of the current financial condition of Blue Ridge. Chambers v. Shayne & Co. (1961), 32 Ill.App.2d 16, 176 N.E.2d 645, cited by plaintiff in support of his basic argument, is also supportive of defendant's contention, since the court there held that such contractual questions are ordinarily for resolution by the trier of fact.

For the reasons stated, the summary judgment for plaintiff is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

Publish abstract only.





3D
26 I.A. 387

No. 60541

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
)	
v.)	
)	
ALEXANDER TRAYLOR,	)	HONORABLE
	)	JAMES M. WALTON
Defendant-Appellant.)	)	PRESIDING

Before Drucker, J., Lorenz, J. and Sullivan, J.

PER CURIAM: (First District, Fifth Division)

In a bench trial, defendant was convicted of the theft of a portable television set having a value of less than \$150. It was charged that he obtained unauthorized control over it with the intent to permanently deprive Leslie Thomas of its use and benefit in violation of Ill. Rev. Stat. 1971, ch. 38, par. 16-1 (a)(1). He was sentenced to a term of 60 days in the House of Correction.

The Public Defender of Cook County, appointed to represent Traylor on appeal, has filed a motion for leave to withdraw, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, stating the only issues possible on appeal would be (1) whether defendant was proven guilty beyond a reasonable doubt, since no evidence was offered to contradict his explanation as to how he came into possession of the television set; and (2) whether the State failed to prove ownership of the television set, a material element of theft. The brief concludes that an appeal on these issues would be legally frivolous and without merit. Defendant was served with a copy of the motion and brief by mail on September 9, 1974. On October 2, 1974, this court advised defendant of the petition for leave to withdraw and informed him that he had until November 8, 1974 to file additional points to support his appeal. He has not responded.

Chicago Police Officer Michael Cushing testified that on October 12, 1973, about 9:30 P.M., he observed defendant carrying

a portable television set in an empty parking lot in a shopping center near 6315 South Peoria Drive, in Chicago. Defendant told him that he found the 18-inch black and white Silvertone television set behind a store formerly used by A&P, at 63rd and Peoria Drive, and that "for the price he paid for the television set, by finding it, even if he had to fix it, it would be worth it." At that point in time, a car pulled up and a young man who got out said defendant had stolen the television set from his car. Cushing thereupon arrested defendant, advised him of his rights, and took him to the police station. After he had been advised of his rights, defendant admitted to the officer that he had taken the set, saying "he needed the television for money, for rent for his apartment."

Leslie Thomas testified she was the owner of an 18-inch Silvertone portable black and white television set (serial number X05110781) and said she did not know defendant nor did she give defendant permission to take the set. She stated the last person to have it with her permission was her brother-in-law, Hurly Dear.

Hurly Dear testified the 18-inch black and white Silvertone television set was in the back seat of his car at about 9:30 P.M. on October 12, 1973, in the shopping center at 62nd and Halsted Street. He saw defendant in the lot with the police officers, and defendant had the set which had been left in his car. He did not see the defendant take the television set.

Defendant testified he found the television sitting in the alley behind the A&P, near 62d and Halsted, and picked it up to take it home; that it looked like it might need "a little work," and he figured he might be able to get it fixed. When he started walking with the set, an officer stopped him and asked what he was doing with it. He told the officer he had found it and was taking it home to see whether it worked and, if not, he was going to fix it. A lady and a man then drove up and, when they claimed

the television, the officer said he would have to take defendant to the station. He denied telling the officer that he took the television set because he needed the money.

Hurley Dear testified in rebuttal that he accompanied Officer Cushing and defendant to the police station and, after the officer advised defendant of his rights, defendant admitted that he stole the television "out of the car" because he needed the money.

The first possible ground for appeal, as stated by the Public Defender in his brief, concerns whether defendant was proven guilty beyond a reasonable doubt. Officer Cushing observed him carrying the set in a store parking lot about 9:30 P.M., only a few minutes after it had been left inside a car in the parking lot. No one actually saw defendant remove the set from the car; however, it was Dear's rebuttal testimony that (1) it had been in the car at 9:30 P.M.; and (2) defendant admitted taking it "from the car" because he needed the money. This testimony corroborated that of Officer Cushing. The trial judge, as the trier of fact, chose to believe the testimony of Officer Cushing and Mr. Dear and not that of defendant. It is the court's responsibility to determine the credibility of witnesses, and this court will not substitute its judgment unless the evidence is so unsatisfactory as to raise a reasonable doubt as to guilt. (People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378.) We believe the proof was sufficient to establish defendant's guilt beyond a reasonable doubt.

The second possible ground of appeal, according to the Public Defender, concerns whether the ownership of the TV set was established. A theft conviction requires proof of ownership or "some sort of superior possessory interest" in one other than defendant, and this element may be proved by circumstantial evidence. (People v. Watkins (1973), 16 Ill.App.3d 541, 306 N.E.2d 504.) Here, complainant testified concerning her ownership of the television set, including the fact that her brother-in-law, Mr. Dear,

had borrowed it. Mr. Dear testified the borrowed set was inside his car in the parking lot at 9:30 P.M. on October 12, 1973. Defendant offered no contrary evidence, nor did he contend at trial that his claim to possession was superior to that of the complaining witness. In view thereof, we believe the evidence was sufficient to support the conclusion of the trial judge that defendant had no possessory interest superior to that of the complaining witness. We agree that this possible ground for appeal would be without merit.

We have examined the record and concur with the conclusion of the Public Defender that none of the arguments thus raised has substantial merit, nor has our examination of the record revealed any additional possible grounds for appeal which are not also frivolous.

The petition of the Public Defender to withdraw his appearance is granted, and the judgment is affirmed.

Affirmed.

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3D
1 26 I.A. 713



60720

PEOPLE OF THE STATE OF ILLINOIS,)	
)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
EDWARD RANDLE,	)	HON. JAMES A. CONDON,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM: (FIRST DISTRICT, FIRST DIVISION)

Before Burke, P. J., Goldberg and Simon, J.J.

Defendant, Edward Randle, was found guilty after a bench trial of the offense of unlawful use of weapons, in violation of section 24-1(a)(10) of the criminal code, and was fined \$100 plus costs. (Ill. Rev. Stat. 1973, ch. 38, par. 24-1(a)(10).) On appeal defendant contends the judgment must be reversed on the ground that he was exempt from the provisions of the statute by reason of his status as a security guard at the time of his arrest; he also contends that the trial court erroneously refused to entertain his motion to suppress physical evidence made during trial. It is unnecessary to consider defendant's latter contention inasmuch as we are of the opinion that the judgment must be reversed for failure of the State to prove defendant guilty as charged, beyond a reasonable doubt.

Chicago Police Officer Thomas Kelly testified for the State that he stopped a vehicle being operated by defendant, without proper lights, at 12:45 a. m. on January 7, 1974, in the 8000 block of South Cottage Grove Avenue in Chicago. Defendant was unable to produce a driver's license, producing instead, a current valid traffic citation; the officer thereupon conducted a protective search of the defendant and found a loaded pistol on his person. Defendant's motion to suppress the weapon and its contents, interposed during the officer's direct examination, was denied by the court as untimely, and the articles seized were



admitted into evidence. The officer further testified that defendant told him that he was employed as a security guard and a grinder for U. S. Steel. The defendant "may have produced" an identification card at that time verifying his security guard employment but the officer did not recall, and he further did not recall defendant telling him that he was on his way home from a security guard job when arrested.

Another charge pending against defendant, apparently arising out of the same incident, was that of failing to register the weapon in question pursuant to the provisions of the city of Chicago municipal code. This charge was dismissed on the ground that defendant had properly registered the weapon.

Defendant testified in his own behalf that he resided in the 8100 block of South Morgan Avenue in Chicago. He stated that he was employed by, and worked Saturdays and Sundays for, the Johnson Detective Agency; that on the evening in question he had been called to 95th Street and Jeffery Avenue in Chicago for security duty which was to have commenced at midnight; that when he arrived at that site at midnight the security guard who was scheduled for that service was already there; and that he was arrested while on his way home from that location.

The charge of unlawful use of weapons, proscribed by section 24-1(a)(10) of the criminal code, may be avoided by advancement of one of the appropriate affirmative defenses provided in section 24-2 of the code among which is the fact that the accused was a security guard commuting between his home and his place of employment within one hour from his departure from home or place of employment, as the case may be. (Ill. Rev. Stat. 1973, ch. 38, par. 24-2(4).) Where an accused raises such affirmative defense, the burden devolves upon the State to prove him guilty beyond a reasonable doubt, both as to



the issue so generated and as to all other elements of the offense. People v. Rinehart, 81 Ill. App. 2d 125, 225 N.E.2d 486 and Ill. Rev. Stat. 1973, ch. 38, par. 3-2.

In the instant case, defendant raised the affirmative defense set forth in section 24-2(4) of the code by his testimony that he was a security guard enroute from his place of employment to his home, within one hour from his departure therefrom, at the time of his arrest. He also demonstrated that his weapon was properly registered in accordance with the local municipal code. The State's evidence, on the other hand, in no manner disputed defendant's employment as a security guard and was at best equivocal in refuting whether defendant had advised the arresting officer of such employment; the officer testified merely that he could not recall whether defendant informed him that he was on his way home from a security guard job or whether defendant exhibited identification as a security guard, the officer stating as to the latter that defendant "may have produced" such identification. The State wholly failed to sustain its burden of proving defendant guilty beyond a reasonable doubt as to the issue thus raised by the affirmative defense. People v. Rinehart, 81 Ill. App. 2d 125, 225 N.E.2d 486 and Ill. Rev. Stat. 1973, ch. 38, par. 3-2.

The State argues here that defendant failed to raise the affirmative defense above noted at the trial and further that he rendered an incredible account at trial of his having been employed in a security guard capacity within the hour of his arrest. These contentions advanced by the State are contradictory. Further, the basis advanced by the State in questioning the credibility of defendant's story is without merit. The State points to the fact that some 45 minutes had elapsed between the time that he left the 95th and Jeffery location and the time that he was arrested, only three miles away; however, while defendant did testify that

he reported for work at midnight, there is no evidence that he left that location at midnight to proceed to his home. Defendant's account of his actions is not so "incredible" as the State contends.

For these reasons the judgment of the circuit court of Cook County is reversed.

JUDGMENT REVERSED.

(Abstract Only)

3D
26 I.A. 714



NO. 59620

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	_____
)	
LEO COOK (LEO KOCH),	)	HONORABLE
	)	MAURICE W. LEE,
Defendant-Appellant.	)	PRESIDING.

BEFORE DOWNING, P.J., STAMOS and LEIGHTON, JJ.:

Per Curiam

Defendant was found guilty after a bench trial of the crime of criminal damage to property. (Ill. Rev. Stat. 1973, ch. 38, par. 21-1(a).) He was sentenced to a term of 30 days in the House of Correction. Defendant appeals, arguing that his guilt was not established beyond a reasonable doubt because the identification testimony was insufficient.

At trial, Mavis Dancy testified that on the evening of May 5, 1973, between 9:00 and 10:00 p.m., she observed the defendant and a group of approximately 50 other youths approach her home. Defendant and some of the youths came on mini-bikes, while others came on foot. The youths were armed with bricks and began to throw them at the front of the home. The youths then ran through a vacant lot toward the rear of her home. Mrs. Dancy stated that she ran to the back of her home, which was lit by a light on a neighbor's garage which shined directly into her yard. She testified that she approached very close to the group and at that time observed the defendant throw a brick through her bedroom window. The defendant and the other members of the group then fled.

Defendant testified that on the evening of May 5, 1973, between 5:30 and 11:30 p.m., he was at the home of Bruno

Carrillo, practicing with a band. He denied ever approaching Mrs. Dancy's home or breaking any window in that home.

Emily Brodecki, Jerry Walters and Simon Bawydanko testified that on the evening of May 5 they were with the defendant at the home of Bruno Carrillo.

Defendant's only argument on appeal is that his guilt was not established beyond a reasonable doubt because the identification testimony was insufficient. The rule is well established in Illinois that the testimony of a single witness, if positive and credible, is sufficient to sustain a conviction even though the testimony is contradicted by the accused. (People v. Arrovo, 18 Ill. App. 3d 187, 309 N. E. 2d 804; People v. Robinson, 3 Ill. App. 3d 858, 279 N. E. 2d 515; People v. Murdock, 3 Ill. App. 3d 746, 279 N. E. 2d 159.) The finding of the trier of fact as to credibility of witnesses will not be disturbed on appeal unless it is based upon evidence which is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. People v. Fisher, 19 Ill. App. 3d 845, 313 N. E. 2d 231; People v. Daily, 41 Ill. 2d 116, 242 N. E. 2d 170.

In the case at bar, the testimony of Mavis Dancy was positive and credible. She described the lighting conditions at the time of the occurrence. She testified that she observed the defendant when he approached the house on a mini-bike and when he was standing outside the front of her home. Mrs. Dancy again observed the defendant at the rear of her home from what she described as a very close position. At that time she observed the defendant throw a brick through the bedroom window of her home. Mrs. Dancy's testimony established that she had ample opportunity to observe the defendant under adequate lighting conditions so as to fix his identity. The identification testimony was sufficiently clear and credible to establish defendant's guilt beyond a reasonable doubt.

Defendant argues that his alibi defense raised a reasonable

doubt as to his guilt. However, the trial judge is not obliged to believe a defendant's alibi testimony. (People v. Jackson, 54 Ill. 2d 143, 295 N. E. 2d 462; People v. Thompkins, 19 Ill. App. 3d 674, 312 N. E. 2d 380; People v. Gaiter, 8 Ill. App. 3d 784, 291 N. E. 2d 172.) Here, the trial judge, after hearing all the evidence, determined that defendant was the perpetrator of the crime charged and upon this record we cannot say that this alibi testimony raised a reasonable doubt as to his guilt.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

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3D
261A. 510



No. 58037

PEOPLE OF THE STATE OF ILLINOIS,)	
)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
ROBERT WHITFIELD,	)	CHESTER STRZALKA,
	)	PRESIDING.
Defendant-Appellant.)	

Before DEMPSEY, McNAMARA and MEJDA, J.J.

PER CURIAM:

Robert Whitfield, defendant, was charged by complaint with unlawful use of weapons (Ill.Rev.Stat. 1971, ch.38, par.24-1(a) (4)), failure to possess an Illinois State Firearm Owner's Identification Card (Ill.Rev.Stat. 1971, ch.38, par.83-2), and failure to register a firearm in violation of City of Chicago Ordinance, ch.11, section 1-7. After a bench trial defendant was found guilty of unlawful use of weapons and failure to possess an Illinois State Firearm Owner's Identification Card. He was sentenced to a term of twenty days in Cook County Jail and ordered to pay a fine of \$100 on each charge, the sentences to run concurrently. Defendant appeals arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt on either charge and that the common law record erroneously reflects that he was found guilty of the City of Chicago Ordinance violation.

At the motion to suppress and at trial, the following evidence was adduced: James Butler, a Chicago police officer, testified that in the early morning hours of November 23, 1971, he and his partner were on a stake-out at 449 Oak Street, Chicago, Illinois. At approximately 1:30 a.m., they observed the defendant walk by their car and noted that he fit the description of the man they were seeking. Defendant stopped in the middle of the block and approached the door of a house. At this time Officer Butler and his partner pulled up in their car, to within 20 feet of the defendant, and ordered him to halt. They then heard an object fall to the ground. They subsequently found a loaded .22 caliber gun at defendant's feet.

Officer Butler testified that defendant did not produce an Illinois State Firearm Owner's Identification Card.

Robert Whitfield, defendant, testified that on November 23, 1971, at approximately 1:30 a.m., he was going to visit his cousin who lives on Oak Street. As he approached his cousin's door, several police officers pulled up and ordered him to halt. Defendant stated that he turned around facing the officers. Defendant denied that he at any time possessed a .22 caliber gun and stated that the first time that he saw the weapon was when it was lying on the ground.

First we consider defendant's argument that the common law record erroneously reflects that he was found guilty of the City of Chicago Ordinance violation. The Report of Proceedings of defendant's trial reflects that the trial judge entered a finding of guilty as to the charges of unlawful use of weapons and failure to possess an Illinois State Firearm Owner's Identification Card and a finding of not guilty as to the City of Chicago Ordinance violation. The common law record, however, reflects that defendant was found guilty on this charge. The rule is well established that the Report of Proceedings and the common law record must be read together as a whole. (People v. Caruth (1972), 4 Ill.App.3d 527, 281 N.E.2d 349.) Here, a review of both the Report of Proceedings and the common law record demonstrate that the clerk mistakenly recorded a finding of guilty as to the City of Chicago Ordinance violation. Accordingly, we will correct the common law record on appeal pursuant to our authority under Supreme Court Rule 615 (Ill.Rev.Stat. 1973, ch.110A, par.615) to show that the defendant was found not guilty of the ordinance violation.

Defendant's next contention is that the evidence was insufficient to establish his guilt on the charge of unlawful use of weapons. Defendant argues that the State's evidence did not establish that he possessed the weapon in question. The rule is well established that in a bench trial it is the responsibility of the trial judge to determine the credibility of witnesses and the weight to be given

to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt will the findings of the trial court be disturbed. People v. Clark (1972), 52 Ill.2d 374, 288 N.E.2d 363; People v. Holmes (1972), 6 Ill.App.3d 254, 285 N.E.2d 561.

In the case at bar, Officer Butler testified that while he and his partner were on a stake-out they observed the defendant walk by their car. The defendant fit the description of a man they were seeking. When defendant walked up to the doorway of a house, the officers pulled up to a point approximately 20 feet from the defendant and ordered him to halt. They heard an object fall to the ground and subsequently recovered a .22 caliber revolver lying on the ground at defendant's feet. The logical and reasonable inference from this testimony is that the gun found at the defendant's feet was the object which defendant dropped when the officers ordered him to halt. This evidence was sufficient to establish that defendant possessed the weapon in question. People v. Miles (1973), 13 Ill.App.3d 453, 300 N.E.2d 822; People v. Johnson (1974), 21 Ill.App.3d 769, 315 N.E.2d 579; People v. Gist (1972), 5 Ill.App.3d 1047, 284 N.E.2d 701.

Defendant also argues that the evidence was insufficient to establish that the weapon was concealed as required by the statute. (Ill.Rev.Stat. 1971, ch.38, par.24-1(a)(4).) To be concealed under this statute, all that is required is that the weapon be concealed from ordinary observation. People v. Colson (1973), 14 Ill.App.3d 375, 302 N.E.2d 409; People v. Zazzetti (1972), 6 Ill.App.3d 858, 286 N.E.2d 745; People v. Latson (1972), 5 Ill.App.3d 1100, 284 N.E.2d 436.

Here, Officer Butler testified that when he first saw the defendant walking down the street, he did not observe any weapon. Again, when the defendant was in the doorway only 20 feet away, Officer Butler did not observe any weapon. It was only after

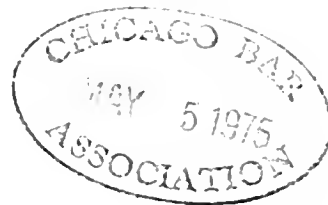
Officer Butler ordered the defendant to halt that he heard the weapon drop and observed it lying at defendant's feet. This testimony was sufficient to establish that the weapon was concealed from ordinary observation. People v. Davis (1971), 3 Ill. App.3d 56, 278 N.E.2d 200.

Defendant's next contention is that the evidence was insufficient to establish his guilt on the charge of failure to possess an Illinois State Firearm Owner's Identification Card (Ill.Rev.Stat. 1971, ch.38, par.83-2.) To establish defendant's guilt under this section it was necessary for the State to prove that he possessed a weapon and did not possess an Illinois State Firearm Owner's Identification Card. The only evidence adduced at trial relating to defendant's failure to possess a State's Firearm Owner's Identification Card was when Officer Butler was asked if the defendant ever produced an Illinois State Firearm Owner's Identification Card. Officer Butler replied that the defendant did not. This testimony did not establish that the defendant was ever asked to produce an Illinois State Firearm Owner's Identification Card or that the defendant did not have such a card in his possession. Under these facts we conclude that the evidence was insufficient to establish beyond a reasonable doubt that defendant failed to have possession of an Illinois State Firearm Owner's Identification Card.

For the foregoing reasons, defendant's conviction on the charge of unlawful use of weapons is affirmed. Defendant's conviction on the charge of failure to possess an Illinois State Firearm Owner's Identification Card is reversed.

Affirmed in part;
reversed in part.

60275)
60276) Consolidated
60277)



PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellant,)

vs.)

AL JOVANOV, A/K/A BRANKO JOVANOV,)
)
Defendant-Appellee,)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellant,)

vs.)

HONORABLE JAMES E. MURPHY,
Presiding.

ANGELINA JOVANOV,)
)
Defendant-Appellee.)

IN THE MATTER OF A SEARCH WARRANT.)
(PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellant,)

vs.)

AL. JOVANOV,)
)
Defendant-Appellee.)

MR. JUSTICE STAMOS delivered the opinion of the court:

Defendants, Al Jovanov, a/k/a Branko Jovanov, and Angelina Jovanov, were separately charged with the unlawful possession of marijuana. (Ill. Rev. Stat. 1973, ch. 56 1/2, par. 704.) Their arrests and the alleged marijuana seized therewith stemmed from a search warrant issued to search Al. Jovanov and the premises at 2728 N. Hampden Ct., Chicago. The circuit court of Cook County granted defendants' motion to quash the search warrant. The State, pursuant to Supreme Court Rule 604(a)(1), now appeals. Ill. Rev. Stat. 1973, ch. 110A, par. 604(a)(1).

Initially, it should be noted that defendants-appellees have failed to file an appearance or brief in this court. Under such circumstances we are not required to consider the merits

of the appeal and where appellant has complied with all the requirements for perfecting an appeal, we are permitted in our discretion to summarily reverse. (People v. Elliott, 9 Ill.App. 3d 178, 292 N.E.2d 58.) Nevertheless, this court may consider the merits of the appeal and in view of the nature and circumstances of this matter, we choose to do so. People v. Farrell, 20 Ill.App.3d 786, 314 N.E.2d 538.

The search warrant in question was issued on December 13, 1972 to Officer Kenneth Burt of the Chicago Police Department to search Al. Jovanov and 2728 N. Hampden Ct., Chicago, and seize a quantity of marijuana. Officer Burt had filed the following affidavit in his complaint for issuance of the search warrant:

I, Kenneth Burt a police officer for the City of Chgo, County Cook had a conversation with a reliable police informant while in the Narcotic section, 1121 So. State on the 13th of Dec. 1972.

This informant has been known to me for the past 10 months and during that time he has given to me information which resulted in four narcotics arrests where narcotic contraband was in fact recovered. Two of the cases the defendants were enrolled in the States Att's School Program and the other two the cases are still pending in the Narcotic court.

This informant stated to me that while in the above described apt. he purchased from a M/W known to him to be Al. Jovanov a quantity of Marijuana on the 12th of Dec. 1972. The informant being a user of Marijuana knew for a fact that what he had purchased from this M/W known to him to be Al. Jovanov was in fact Marijuana because he got high from smoking it.

The informant further stated to me that as he was leaving the above described apt. he observed in the possession and under the direct control of this M/W known to him to be Al. Jovanov a large quantity of Marijuana, from which his purchase was made.

On the basis of Officer Burt's affidavit a search warrant was issued and a search conducted the same day. During that search, two containers of "green leaf and stems" and one envelope of "green leaf" were seized. Defendants were subsequently charged with unlawful possession of marijuana.

60275)
60276) Consolidated
60277)

The sole question presented by this appeal is whether Officer Burt's affidavit constituted sufficient probable cause for the issuing magistrate to properly grant a search warrant.

The constitutional requirements for an affidavit sufficient to establish probable cause for issuance of a search warrant were enunciated in Aguilar v. Texas, 378 U.S. 108. There the court stated:

Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, Jones v. United States, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, was "credible" or his information "reliable." 378 U.S. at 114.

At trial, defendants did not challenge the first of the Aguilar requirements, namely, that the affidavit set forth circumstances from which the informant concluded that the narcotics were where he claimed they were. The absence of such an attack on the affidavit is not surprising. For the affidavit states the required facts: that the informant was a user of marijuana, that he purchased marijuana from defendant at a certain address, that he got "high" from smoking what he purchased, and that as he was leaving that address he observed additional marijuana under the direct control of the defendant. From such personal observation by the informant, the issuing magistrate could properly conclude that there was probable cause to believe that narcotics were and are continuing to be held where the informant claimed they were. People v. McNeil, 52 Ill.2d 409, 288 N.E.2d 464; People v. Ranson, 4 Ill.App.3d 953, 282 N.E.2d 462.

The second Aguilar requirement, namely, that the affidavit set forth the circumstances from which the affiant concluded that the informant was credible and reliable, was challenged by

defendants. Specifically, defendants argued that an informant's reliability can only be sufficiently established if his prior information has resulted in convictions and not mere arrests. The State contends that the informant's reliability was adequately established since Officer Burt stated in his affidavit that over the past 10 months the informant had given him information that resulted in four arrests for narcotic violations and in all of which narcotic contraband was recovered.

It is clear that an affidavit based on the personal observations of one other than the affiant is sufficient to show probable cause for issuance of a search warrant so long as a substantial basis for crediting the hearsay is presented. (People v. Williams, 27 Ill.2d 542, 190 N.E.2d 303; People v. Francisco, 44 Ill.2d 373, 255 N.E.2d 413.) In such cases, independent corroboration of the informant's information contained in the affidavit is not essential to establish probable cause for issuance of the search warrant. (People v. Volturo, 8 Ill.App. 3d 131, 289 N.E.2d 277.) Rather, the only requirement is that the issuing magistrate be able to make an informed and deliberate determination from the underlying circumstances set forth in the affidavit that the informant is, in fact, reliable and accurate. Such a determination must be made in a commonsense, realistic fashion. (People v. Dillon, 44 Ill.2d 482, 256 N.E.2d 451.) To now hold that an informant may be termed "reliable" only when there has been a showing of convictions resulting from prior information or tips would be both unrealistic and unnecessarily rigid.

During the hearing on the motion to quash, defendants relied on People v. McClellan, 34 Ill.2d 572, 219 N.E.2d 97. Defendants argued that McClellan established a standard of reliability based on previously obtained convictions, and that mere arrests

are insufficient to adequately establish reliability. In McClellan, police officers arrested McClellan and recovered narcotics on an informant's tip that McClellan was "dirty." However, the record showed that the informer was not a paid or special informer and that the officers did not know him other than as an addict in the area. Although one officer testified that the informer had furnished information on three previous occasions which resulted in arrests, the court stated that this testimony only showed that the officer acted on the informant's previous tips and does not show that the previous tips proved to be accurate. The court refused to allow an informant's reliability to be left to inferences as to whether his previous tips were accurate, and reversed the conviction. However, the court expressly did not reach the question now before this court, stating:

It is not necessary for us to decide whether the People must show that the previous tips from an informer resulted in convictions, as the defendant contends; but it is sufficient, at this time, to hold that the fact that the police acted upon previous information of an informer does not prove that the prior information was accurate and the informer reliable. 34 Ill. 2d at 574.

The instant facts are far different than those in McClellan and provide exactly what McClellan demands: accurate prior information.

Officer Burt's affidavit not only stated that he acted upon the informant's previous tips, but that on each occasion, they proved accurate. In each of the four previous tips mentioned, narcotics were recovered. This allegation of accuracy is all that McClellan and Aguilar require. As the court in People v. Lawrence, 133 Ill.App.2d 542, 544, 273 N.E.2d 637, stated:

Convictions, while corroborative of an informer's reliability, are not essential in establishing his reliability. Arrests, standing alone, do not establish reliability, but information that has been proved accurate does. Arrestees may not be prosecuted; if prosecuted they may not be indicted;

if indicted they may not be tried; if tried they may not be convicted. If a case is tried, the informer may never testify; his credibility may never be passed upon in court. The true test of his reliability is the accuracy of his information.

The court in Lawrence, presented with the same argument as defendant advanced here, concluded that probable cause had existed for defendant's arrest and search, despite the absence of previously obtained convictions resulting from the informer's prior tips. The same result has also been reached in People v. Packer, ___ Ill.App.3d ___, ___ N.E.2d ___ (First District, No. 60355, December 19, 1974).

In the instant case, the affidavit established that the informant's information had proven reliable and, most importantly, accurate on four previous occasions. From the circumstances set forth in Officer Burt's affidavit, the issuing magistrate could have properly concluded that the reliability of the informant was adequately established to justify issuance of the search warrant.

Both Aguilar requirements thus having been met, probable cause existed which would justify a man of reasonable caution to believe that a crime has been or is being committed and that the evidence thereof is on the person or premises to be searched. (People v. Johnson, 5 Ill.App.3d 948, 284 N.E.2d 692.) Thus, it was error to quash the search warrant. Accordingly, the order of the circuit court of Cook County is reversed and the cause remanded for further proceedings.

ORDER REVERSED AND CAUSE REMANDED.

DOWNING, F.J., and HAYES, J. concur.

PUBLISH ABSTRACT ONLY.

60438 through 60451
(consolidated)



PEOPLE OF THE STATE OF ILLINOIS,)
 Plaintiff-Appellant,)
 v.)
 JESSIE PUGH,)
 Defendant-Appellee.)
 _____)
 CITY OF CHICAGO, a municipal)
 corporation,)
 Plaintiff-Appellant,)
 v.)
 JESSIE PUGH,)
 Defendant-Appellee.)
 _____)
 IN THE MATTER OF A SEARCH WARRANT)
 (PEOPLE OF THE STATE OF ILLINOIS),)
 Appellant,)
 v.)
 JESSIE PUGH,)
 Appellee.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
JAMES E. MURPHY,
Presiding.

PER CURIAM.

Before DEMPSEY, J., McNAMARA, J., and MEJDA, J.

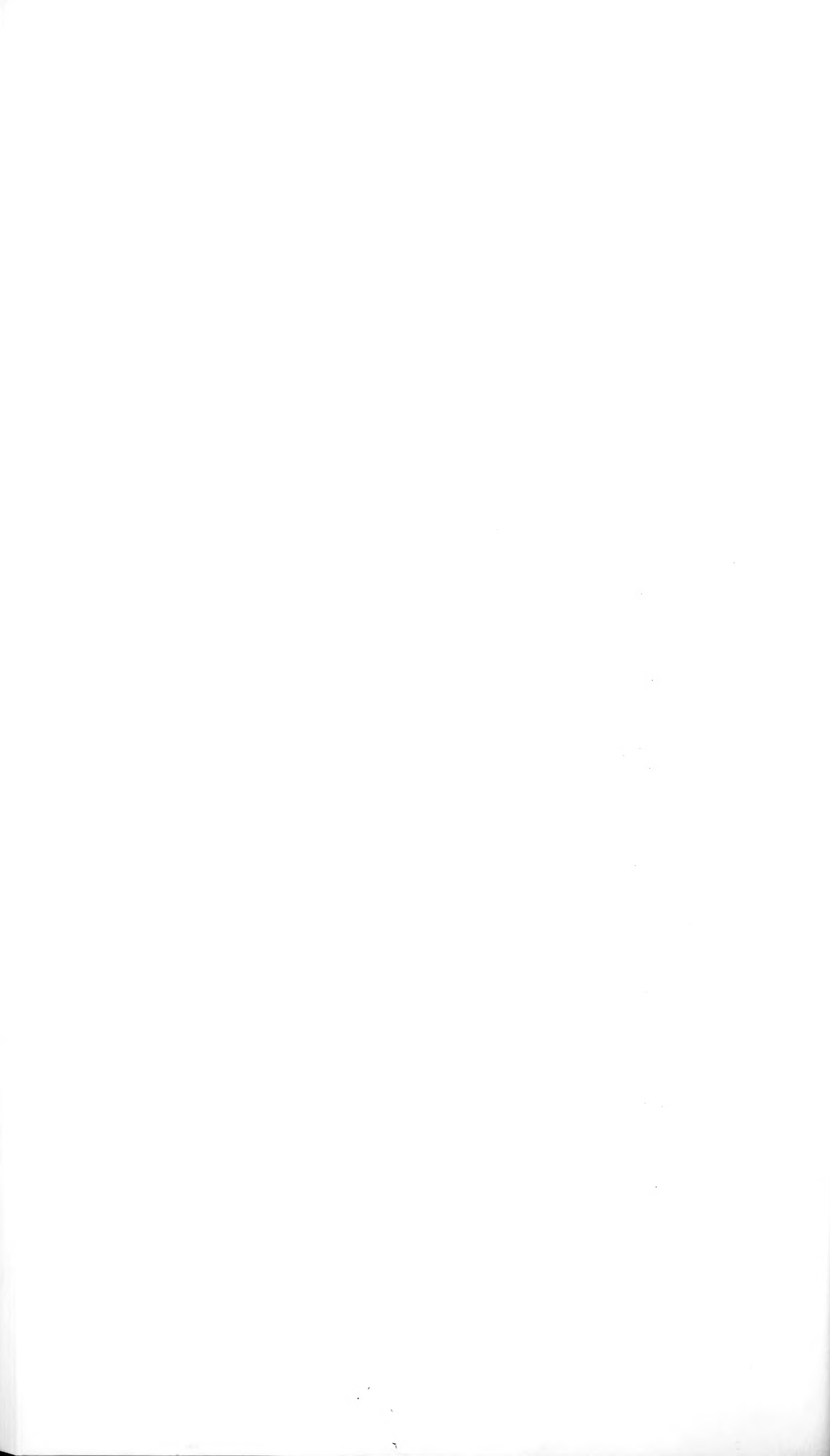
Defendant, Jessie Pugh, was charged by complaint with thirteen separate offenses growing out of the execution of a search warrant on September 27, 1973, including two charges of possession of a controlled substance (Ill. Rev. Stat. 1971, ch. 56-1/2, par. 1402), one charge of possession of marijuana (Ill. Rev. Stat. 1971, ch. 56-1/2, par. 704), unlawful use of weapons (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a)(4)), failure to possess an Illinois Firearm Owner's Identification Card (Ill. Rev. Stat. 1971, ch. 38, par. 83-2), and eight charges of violating either section 1-7 or 1-8 of the Municipal Code of the City of Chicago by failing to register and carry a registration certificate for certain weapons. Prior to trial, defendant

made a motion to quash the search warrant and to suppress the evidence obtained as a result of the warrant. Following a hearing, the trial court entered an order granting the motion on the ground that the informant's reliability was not shown by sufficient facts to support a finding of probable cause. Each of the charges was stricken with leave to reinstate. The State appeals from the order quashing the warrant and suppressing the evidence, pursuant to Supreme Court Rule 604(a)(1). (Ill. Rev. Stat. 1973, ch. 110A, par. 604(a)(1).) The only issue on appeal is whether the complaint for search warrant established the reliability of the informer who provided the information contained in the complaint.

The warrant in question was issued by another judge on September 27, 1973, at 10:30 P.M., for the defendant and Clydes Grocery Store, 2106 East 79th Street, in Chicago, and was based on a verified complaint by Chicago Police Officer Lovejoy Foster which stated in pertinent part:

"Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the [person and] premises set forth above: I, investigator Lovejoy Foster and my partner investigator Richard Peck, both Police Officers of the City of Chicago, had a conversation with a reliable informant on the 27th of Sept 1973, about 4:30 PM. We have known this informant for the past two years. This informant has given me investigator Lovejoy Foster and my partner investigator Richard Peck information on four occasions during those two years all pertaining to narcotics law violations. On each of those occasions my partner and I made at least one arrest and recovered dangerous drugs, narcotics or narcotics paraphernalia.

"During our conversation on 27th Sept. 1973 about 4:30 PM with this informant he stated that on Thursday the 27th of Sept. 1973 about 1:30 PM he was in Clydes Grocery Store at 2106 E. 79th Street and there in this store at this time he turned [bought] \$75.00 worth of Cocaine from the aforementioned and described Jesse Pugh. Informant stated that Jesse Pugh is the operator of Clydes Grocery Store. This informant further stated



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that he used some of the Cocaine and it was indeed cocaine because he has used cocaine in the past and knows the effects of cocaine. Informant stated that Jesse Pugh told him that he had more cocaine and some heroin and he could get a break on price if he bought larger amounts. Informant said that he has bought cocaine and heroin from Jesse Pugh in Clydes Grocery Store in the past. Informant stated that when he left Clydes Grocery Store, Jesse Pugh had more cocaine and some heroin.

"The affiant checked with the Record and Inquiry Section of the Chicago Police Department. Records revealed Jesse Pugh, IR #42894, fitting the aforementioned description. Informant viewed the photo and stated that the Jesse Pugh whom he bought the cocaine from and the person in the photo were the same person. Police records show numerous arrest for narcotics violations. The affiant made a surveillance of Clydes Grocery Store, 2106 E. 79th Street. Observed a 1968 Oldsmobile parked on the street in front of 2106 E. 79th Street, 1973 Illinois plates DX-6821, checked to Jessie J. Pugh, 2106 E. 79th Street. During this surveillance we observed known narcotics users enter and exit from the store, they were not carrying any visible packages."

The constitutional requirement for obtaining a search warrant has been set forth by the United States Supreme Court in Aguilar v. Texas (1964), 378 U.S. 108. See also Spinelli v. United States (1969), 393 U.S. 410; United States v. Harris (1971), 403 U.S. 573; and Whitely v. Warden (1971), 401 U.S. 560. The Aguilar affidavit which the Supreme Court found was defective stated only the following:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." (378 U.S. 108, 109.)

Although the Supreme Court said a search warrant could properly be based on facts provided by an informer, it also held that the judicial officer issuing the warrant must be informed "of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded" that the informant was credible or his information reliable. (378 U.S. 114.)

Often, as here, the complaint for search warrant asserts the past reliability of the informer as a reason for crediting his present information. Defendant contends that the informer's past reliability was not established because the affidavit did not indicate that any of the past information had resulted in "indictments," relying on People v. Lawrence (1971), 133 Ill.App.2d 542, 273 N.E. 2d 637. However, there we said:

"Convictions, while corroborative of an informer's reliability, are not essential in establishing his reliability. Arrests, standing alone, do not establish reliability, but information that has been proved accurate does. Arrestees may not be prosecuted; if prosecuted they may not be indicted; if indicted they may not be tried; if tried they may not be convicted. If a case is tried, the informer may never testify; his credibility may never be passed upon in court. The true test of his reliability is the accuracy of his information."

This test is met by the complaint for search warrant in the case before us which states that on four previous occasions the information provided by the informer had proved to be accurate because on each of the four previous occasions dangerous drugs, narcotics or narcotics paraphernalia were recovered and at least one arrest was made. The "accuracy" of the information is the test of reliability, not what happened subsequently in the legal process which, as we pointed out in Lawrence, may be affected by factors other than whether the information provided was accurate.

In addition, the complaint here sets forth the underlying circumstances contemplated by the United States Supreme Court in Aguilar. Those circumstances did establish the credibility of the informant on that particular occasion. The complaint details the precise moment when the informant supplied the information, precisely when and where he made the purchase, the nature of the information he supplied to the police, and how the informer knew that the material he had purchased

was contraband. The complaint therefore provided the specificity and factual detail that were altogether missing from the affidavit in Aguilar. Given these underlying circumstances as set forth by the police officer, the judicial officer issuing the warrant was able to determine the factual basis upon which the affiant and the informer were proceeding. Since the recital of the informant was specific and detailed and believable, the magistrate was able to determine that the information upon which the police sought a warrant was reasonably trustworthy.

Moreover, the police did not simply take the word of the informer. They tried independently to determine whether the information provided was trustworthy, and discovered that the suspect, whom the informer identified from a police photo, had a criminal record showing numerous arrests for narcotic violations. The United States Supreme Court has held that a policeman's knowledge of a suspect's reputation is information on which he may properly rely.

United States v. Harris (1971), 403 U.S. 573, 583. In addition, Officer Foster made a surveillance of the grocery store in question and observed known narcotics users enter and exit the store, not carrying any visible packages [such as one might expect of most customers leaving a grocery store], and made a check of the ownership of a 1968 Oldsmobile parked in front of the store which "checked" to the defendant.

We therefore conclude that the past reliability of the informer was established by the information contained in the complaint for search warrant. The complaint also contained sufficient facts, particulars and details and underlying circumstances from which the issuing judicial officer could determine that the information provided was reasonably trustworthy. In addition, the police officers independently corroborated the information supplied by the informant.

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The affidavit for search warrant therefore did contain sufficient facts and circumstances to enable the issuing judicial officer properly to assess whether the information contained in it was reasonably trustworthy.

Considering all the circumstances, the affidavit was sufficient to establish probable cause and to establish the reliability of the information provided by the informer. The judgment of the circuit court is therefore reversed and the cause remanded for further proceedings.

Reversed and remanded.

No. 59633

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
RENARD JACKSON,	)	RICHARD J. FITZGERALD,
Defendant-Appellant.	)	JUDGE PRESIDING.

Before Downing, P.J., Leighton, and Hayes, JJ.

PER CURIAM

Renard Jackson, defendant, was charged by three separate indictments with two counts of armed robbery and one count of jumping bail. (Ill. Rev. Stat. 1971, ch. 38, pars. 18-2, 32-10.) On August 17, 1973, defendant entered a negotiated plea of guilty and was sentenced to a term of four to five years on each armed robbery charge and a term of one to three years on the bail jumping charge, all sentences to run concurrently. Defendant appeals, arguing that the trial court in accepting his plea of guilty failed properly to admonish him of the nature of the charges and the consequences of his plea as required by Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402), and that the trial court erred in sentencing him under the Unified Code of Corrections as to the armed robbery charges since the law in effect at the time of the commission of the crime provided for a lower possible minimum sentence.

On August 17, 1973, when defendant's case was called, defense counsel, in defendant's presence, requested a pre-trial conference with the assistant state's attorney. When defendant's case was recalled, after the conference, the assistant state's attorney informed the trial judge that as a result of the conference the State had agreed to recommend a sentence of four to five years on each charge, all sentences to run concurrently, if the defendant were to enter a plea of guilty. The assistant state's attorney also informed the trial judge that as a result of the pre-trial conference the defendant had elected to be

sentenced under the Unified Code of Corrections. Defense counsel, in defendant's presence, stated his agreement with the prosecutor's remarks. The trial judge informed defendant that if he were to enter a plea of guilty, the court would concur with the State's recommendation. The trial judge advised defendant that he was charged in three separate indictments with two charges of armed robbery and one charge of bail jumping. Defendant stated that he wished to enter a plea of guilty to all three indictments.

The facts which provided the basis for each of the indictments were then stipulated to by the parties. The stipulation covered approximately seven pages in the transcript of the proceedings. Defendant stated that no threats, coercion or promises had been used to induce him to enter a plea of guilty and that he was doing so voluntarily. The trial judge informed defendant that he had a right to persist in his plea of not guilty and that by entering a plea of guilty he would waive his right to a trial by jury, his right to remain silent, his right to cross-examine the witnesses against him, and his right to offer evidence in his own behalf. The trial judge informed defendant that he was presumed innocent of the charges and that at a trial the State would have the obligation of proving him guilty of each charge beyond a reasonable doubt. Defendant was advised of the possible statutory penalties for each of the crimes charged as stated in the Unified Code of Corrections under which defendant had elected to be sentenced. Defendant stated that he understood the possible penalties. Defendant persisted in his plea of guilty which was then accepted by the trial court.

Defendant's first contention on appeal is that the trial judge, in accepting his plea of guilty, failed to admonish him as to the nature of the charges pursuant to Supreme Court Rule 402. Defendant makes no argument concerning the factual basis, rather he suggests the court should have advised the defendant .

of the elements of the charge he faced "and thus allowed to compare the agreed facts to the statutory standard." The rule that a defendant must be advised as to the nature of the charge does not require the trial judge to recite all the facts which constitute the offense. The admonition of the crime by name has been held sufficient to apprise the defendant of the nature of the crime charged. (People v. Carrion, 21 Ill. App. 3d 195, 315 N.E.2d 251; People v. Tennyson, 9 Ill. App. 3d 329, 292 N.E.2d 223.) The rule requires that there need be only substantial, not literal compliance with its provisions. People v. Krantz, 58 Ill. 2d 187, 317 N.E.2d 559.

In the case at bar, the trial judge, in accepting the negotiated plea of guilty specifically informed defendant that he was charged in three separate indictments with two charges of armed robbery and one charge of bail jumping. A lengthy stipulation of facts as to the three indictments, covering approximately seven pages in the transcript of proceedings, was read in open court in the presence of the defendant. This coupled with a statement as to identifying the crime by name for each indictment clearly informed the defendant of the nature of each charge. There is absolutely nothing in the record to suggest the defendant was not advised or did not understand each of the charges. Defendant was also advised as to the possible statutory penalties for the crimes of armed robbery and bail jumping. These admonishments were sufficient to apprise the defendant as to the nature of the charges against him.

Defendant's second contention on appeal is that the trial judge, in accepting his plea of guilty, failed to admonish him as to the consequences of his plea of guilty pursuant to Supreme Court Rule 402. Here, defendant argues that the trial judge failed to advise him of the mandatory parole terms under the Unified Code of Corrections. The supreme court, in Krantz, specifically rejected this contention, holding that a defendant need not be informed of the mandatory parole provisions of the

Unified Code of Corrections. The court said:

"And must he be informed of the provision for mandatory parole in case of an indeterminate sentence for a felony (par. 1005-8(c))? As we have just noted, we do not consider that substantial compliance with Rule 402(a)(2) requires such admonitions." 58 Ill. 2d 195.

Defendant in his reply brief for the first time argues that this court should hold the mandatory parole term under the Unified Code of Corrections unconstitutional. This argument was not presented in the trial court or in defendant's initial brief. Under these circumstances we hold that this argument is not properly before this court.

Defendant's final contention on appeal is that the trial court erred in sentencing him under the Unified Code of Corrections on the two charges of armed robbery since the law in effect at the time of the commission of the crime provided for a lesser penalty. Defendant argues that since the law in effect at the time of the commission of the crime provided for a minimum possible sentence of two years and that under the Unified Code of Corrections the minimum possible sentence was four years, he should have been sentenced under the law in effect at the time of the commission of the crime. Here, defendant entered a negotiated plea of guilty only after a pre-trial conference with the assistant state's attorney. Prior to accepting defendant's plea of guilty, the defendant was specifically advised by the trial judge that he would follow the recommendation of the assistant state's attorney. The defendant before entering his plea of guilty, therefore, knew the exact sentence that he would receive. The assistant state's attorney in advising the trial judge of the results of the pre-trial conference specifically stated that the defendant was electing to be sentenced under the Unified Code of Corrections. Defense counsel, in defendant's presence, agreed with this statement. The trial judge, in admonishing the defendant as to the possible statutory penalties for each of the crimes charged, advised the defendant of the

penalties under the Unified Code of Corrections, stating that defendant was electing to be sentenced under the Code. Defendant agreed with the trial court's statement. The sentence of four to five years imposed upon the defendant on the charges of armed robbery was a permissible sentence both under the law in effect at the time of the commission of the crime and under the Unified Code of Corrections. Defendant's plea negotiations were entered into in an attempt to avoid a higher penalty. Defendant received the sentence agreed to at the pre-trial conference. Under these facts, we conclude that the admonitions given defendant were sufficient to constitute substantial compliance with Supreme Court Rule 402, and that defendant in entering his negotiated plea of guilty voluntarily chose to be sentenced under the Unified Code of Corrections. See People v. Davis (1st Dist. 1974), 24 Ill. App. 3d 756, 321 N.E.2d 382.

Accordingly, we hold that defendant's negotiated plea of guilty was voluntarily and understandingly entered and that the judgments of the trial court should be affirmed.

Judgments affirmed.

(Publish abstract only.)

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Appellee,) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
 v.)
)
 WAYNE COWLEY,)
)
 Appellant.)

HON. JOHN S. BOYLE,
 JUDGE PRESIDING.

Mr. JUSTICE BURMAN delivered the opinion of the court.

The defendant, Wayne Cowley, was found guilty after a bench trial on the charge of armed robbery and sentenced to serve a term of four (4) to six (6) years in the penitentiary.

An appeal was taken by defendant and the Public Defender was appointed to represent him. On November 22, 1974, the Public Defender filed a motion in this Court, after serving the defendant with a copy, for leave to withdraw as his counsel on the ground that the appeal is without merit.

In support thereof, and pursuant to the case of Anders v. California, 386 U.S. 738, he attached a brief in which he stated that the only basis for an appeal would be that the identification made by the single witness was incredible and uncertain and that he did not knowingly and understandingly waive his right to jury trial.

Briefly the record reveals that the complainant who was about to board an El train was accosted by a man who robbed him at knife point of the sum of \$152.00 and of a watch and ring. He followed the man and when he saw a squad car he gave the police the description of his assailant and cruised the neighborhood with them in a squad car. He informed the police that the person who robbed him was sitting on the backseat of a bus. They boarded the

bus just a short time after the robbery occurred and he identified the defendant as the person who robbed him. The sum of \$152.00 was found under the seat and the watch and ring were also recovered.

The Public Defender points out that the record shows that the complainant made a positive identification of the defendant soon after the robbery. Positive identification by one witness who has ample opportunity for observation may be sufficient to support a conviction. People v. Mack, 25 Ill.2d 416. We cannot say that the complainant's opportunity to observe was insufficient or incredible.

As the Public Defender suggests the Court explained to the defendant that he had a right to a jury trial which was followed by an execution by defendant of a jury waiver form. The record clearly establishes that the defendant knowingly, voluntarily and understandingly, waived a trial by jury.

The defendant was notified by this Court of the Public Defender's motion for leave to withdraw as his counsel and a copy of the motion and brief were attached. The defendant was informed that he had until February 3, 1975 to file any points he might have in support of his appeal. We informed him that after such date we would make a full examination of all of the proceedings and decide whether the appeal is wholly frivolous and if we so find we may grant the Public Defender's request for withdrawal and affirm the judgment without further appointment of counsel.

We have made a complete examination of the record and we agree with the Public Defender that there is no merit to this appeal. The Public Defender's request for leave to withdraw as counsel for defendant is therefore granted, and the judgment is affirmed and the appeal is dismissed.

Judgment Affirmed.

Adesko and Johnson, JJ., concur.

(Abstract only)



PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
)	
CLARENCE SCOTT,	)	HON. IRWIN COHEN,
	)	JUDGE PRESIDING.
Defendant-Appellant.)	

Mr. JUSTICE BURMAN delivered the opinion of the court.

The defendant was charged with the offense of gambling "in that he knowingly possessed an instrument, a book, or apparatus, for the purpose of recording and registering bets and wagers," in violation of section 28-1(a)(5) of the Illinois Criminal Code [Ill.Rev.Stat.1973, ch. 38, par.28-1(a)(5)]. Following a bench trial, he was found guilty and fined \$90.00.

The sole issue on appeal is whether the evidence shows that the defendant was properly admonished of his rights pursuant to Miranda v. Arizona, 384 U.S.436.

At trial, Officer William Trigg testified that he went to the third floor of 252 West 37th Street in Chicago to execute a search warrant, which he displayed upon entering. He found horse betting paraphernalia showing signs of bets being taken and race result sheets on a table in the room which he confiscated and had in court. The defense stipulated to the chain of evidence. The officer then testified that the defendant and two other people were in the room. He placed the defendant under arrest, and informed him of his constitutional rights, reciting them from a card which he had on his person at the time. He did not have the card with him in court. He was asked if he had any independent recollection of the rights he recited at the time and he said:

"Yes, I advised him that he could -- he didn't have to admit anything, and that he could get himself a lawyer if he so desired, if he wasn't able to get one we would try to supply him with one and he was free to make a call at any time after he got to the station."

He asked the defendant if he understood those rights and the defendant replied that he did. In response to the police officer's inquiry, the defendant told him that "this [was] not his thing," "[t]hat he was operating it for someone else ***." He asked the defendant where the money which the receipts evidenced was located, and the defendant said that, except for \$11.00 which belonged to him, the money in his pocket, totaling \$79.00, "belonged to this."

The defendant testified in his own defense. He observed the officer search the premises and take things off the table. He denied telling the officer that he was operating the place for someone else or that he took any bets or answered the telephone. On cross-examination he said that the \$79.00 was given to him by one Horace Scott (apparently no relation to the defendant) and he was supposed to give it to a fellow who would come to pick it up.

The defendant solely contends that his statements should not have been admitted because there was never a demonstration by the prosecution that the defendant was warned that anything he said could and would be used against him at trial as required by Miranda, and therefore his statements were inadmissible as evidenced against him. It is argued that since these statements were the only relevant evidence of the defendant's knowing possession of any gambling equipment the conviction should be reversed.

The record shows that the officer read from a card when he advised the defendant of his constitutional rights. This is the usual procedure used by police officers in conforming to the requirements of Miranda. The officer did not have the card with him at trial and no demand was made by the defense that it should be produced. When asked if he had any independent recollection of the rights recited from the card he testified as to them, but apparently inadvertently omitted mention of the warning that anything the defendant said could and would be used against him in court.

He then testified to the defendant's statement without objection by defense counsel at that point. When asked on cross-examination if those were the only rights that he enumerated to the defendant, he responded only that they were "basically" the rights he recited, "that [he] could recall."

In making a factual determination that the defendant was properly admonished in compliance with Miranda the trial court need not be convinced beyond a reasonable doubt and its findings will not be disturbed unless it can be said that they are against the manifest weight of the evidence. (People v. Burbank, 53 Ill.2d 261, 291 N.E.2d 161.) In light of these standards, although the State could well have presented its case more effectively, a complete reading of the record indicates to us that a reversal is not necessary. (See People v. Scott, 52 Ill.2d 432, 288 N.E.2d 478; cf. People v. Conzaes, 22 Ill.App.3d 83, 316 N.E.2d 800; see also Horner v. State, 255 Ark.426, 501 S.W.2d 217; Lewis v. State, Fla.App., 296 So.2d 575; State v. Taylor, 60 Wis.2d 506, 210 N.W.2d 873.)

There is no further claim that the statements of the defendant were in any way involuntary. We therefore affirm the judgment of the circuit court.

AFFIRMED.

Dieringer, P.J., and
Adesko, J., concur.

(Abstract only)

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PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
JEFF D. TRULL, JR.,)
)
Defendant-Appellant.) HONORABLE
FRED J. SURIA, JR.,
PRESIDING.

PER CURIAM: FIRST DISTRICT, FIFTH DIVISION.

BEFORE DRUCKER, LORENZ AND SULLIVAN, JJ.

Defendant was charged in two alternate counts of an indictment with the murder of his brother, Jessie Trull, a violation of Section 9-1 of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, par. 9-1.) After a bench trial defendant was found guilty of murder and sentenced to a term of 16 years to 32 years. Defendant contends on appeal that his guilt was not proven beyond a reasonable doubt; that if he was proven guilty of an offense, the finding should have been guilty of involuntary manslaughter; that the trial court improperly limited defendant's impeachment of one of the State's witnesses; and that another of the State's witnesses was improperly declared a court's witness.

State's witness Bobbie Jean Trull was with her cousins, defendant and Jessie Trull, on June 12, 1971, at the apartment of her aunt and uncle, located at 1811 West Washburn, Chicago. When she arrived at the apartment some time that day, she entered the washroom; Jessie also entered the washroom and then walked out; she could not recall hearing anything transpire in the apartment while she was in the washroom.

Throughout the initial portion of Miss Trull's examination by the State she exhibited hostility toward the prosecutor, refused to answer numerous questions propounded by him, gave conflicting answer concerning defendant, Jessie and the other persons present in the apartment, commented that she was upset



and refused to read from the minutes of her testimony before the grand jury because she did not wish to testify against defendant. Questioning of Miss Trull by the court demonstrated a continued hostility and, after a request by the State, she was declared a court's witness over a defense objection.

Examination of Miss Trull by the State continued, and it was disclosed that after she left the washroom Jessie and defendant were engaged in conversation. She observed defendant strike Jessie. She observed a gun in defendant's hand. Defendant left the apartment before Jessie.

It was further disclosed on examination by the defense that at the time of trial Miss Trull was residing at a mental hospital and was under medication for drug addiction. She had voluntarily entered the hospital three weeks before because she had taken an overdose of narcotics. She had used narcotics on June 12, 1971, and was addicted to heroin on that date, but she did not "fix" when she entered the washroom in her uncle's apartment. She did not know whether she was wanted by the police on the day of trial on a bond forfeiture warrant, but she had violated a prior court date.

State's witness George Anderson had known Jessie and defendant "a long time." Identifying the positions of the respective parties and the physical layout of the building from photographs subsequently introduced into evidence, Anderson stated that he was in his first floor apartment in a building at 1747 West Washburn at about 9:00 P.M. on June 12, 1971, when Jessie knocked on the outside door to the building. Anderson opened the door, and Jessie related that he had had an argument with defendant. Defendant was standing outside the building, about eight to ten feet away, below the front stairs and near the curb, holding a gun in his hand. He observed no one else with a gun outside the

building. Anderson tried to quiet Jessie, but the latter, using an obscenity, told him to close the door. The door was closed, and after Anderson locked it he heard a gunshot and was struck in the face by splinters from a bullet hole in the door. The shot went off as soon as the door was closed. Anderson dropped to the floor, and he knew that Jessie also dropped to the floor. Anderson then entered his apartment and telephoned the police. Jessie, who was bleeding from the left side, appeared at his doorway, made a sound and fell to the floor. Jessie's father was then called.

Anderson proceeded to the front door of the building and advised defendant, who was still standing outside holding the gun, that he had "shot his brother" or that his brother "had been shot." The defendant replied, "I better make sure," "or something like that" and entered the apartment followed by a person named Johnny Bell who later left the scene. Defendant told Anderson and a person named "Red" to take Jessie to the hospital, and as they were placing him into Anderson's automobile, the police arrived, and defendant left the scene.

It was brought out on cross-examination that Anderson had used narcotics for 19 years, and that he had used narcotics on June 12, 1971. Anderson spoke to the police that day and gave them the same account of the shooting as he had related on the witness stand. He was not certain of the time, the day or the month of the shooting, and he did not know the number of people on the street at that time. He testified that the hallway of the apartment building was lighted when he opened the front door in response to Jessie's knock, but he gave no direct answer when asked by defense counsel if he had testified at the preliminary hearing that the hallway had been dark at that time. The witness further did not recall testifying at the preliminary hearing that

10 to 15 seconds had elapsed between the time the shot was fired and the time he again saw defendant. He did not see the person named "Red" when he first saw defendant outside the building. He did not recall what he told the police two days after the incident relative to his allegedly having dragged Jessie into his apartment and defendant allegedly entering with the gun and observing that he had shot his brother. He did not know whether defendant ever stated that he shot his brother. He was on medication for his drug addiction at the time of trial. He had not been convicted of any criminal offense in the past.

Stipulated evidence was adduced that the investigating police officer found a hole in the outer door of the apartment building which resulted from a bullet fired from the outside of the building; that he had observed the entry hole of a bullet below the left ear of the deceased and an exit hole behind the right ear; that he had observed a fresh laceration below the left eye of the deceased on the cheekbone; and that the deceased died as a result of a bullet wound to the neck. Defendant's motion for a directed finding, on the ground that the State's witnesses were incredible due, inter alia, to their addiction to narcotics, was denied.

Dr. Carl Bell, a psychiatrist at the Illinois State Mental Hospital, was called as a defense witness and testified that he was treating State's witness Trull at the time of trial. Miss Trull admitted herself to the hospital after ingesting an overdose of drugs, after which it was determined that she was suffering from a "passive-aggressive" personality disorder. Such disorder was a desire to be accepted by one's peers and an inability to say "no," and manifests itself in a stubborn or non-answering manner, venting the aggressiveness. Her condition was "extremely common." It was not an organic defect. It may

affect her willingness to tell what she recalls, but it does not affect her ability to recall. Miss Trull was well-oriented as to time and place, and she understood the nature of her discussions with the doctor. She is competent. Her hospital records were introduced into evidence.

Opinion

Defendant initially contends that the State failed to prove his guilt beyond a reasonable doubt on the theories that no evidence was adduced that he in fact fired the shot which killed Jessie or that he possessed the requisite intent to commit such an act, and that the State's main witnesses were shown to have been unworthy of belief. We disagree on both grounds.

Defendant's argument that the State's main witnesses were unworthy of belief is bottomed upon the fact that both witnesses were habitual users of drugs, and that they used drugs on the day of the incident. The fact that a witness is addicted to narcotics bears upon his credibility but does not render his testimony incompetent or wholly unbelievable. If such testimony is supported by other, independent evidence, a contention that such testimony leaves a reasonable doubt as to guilt will be rejected. (People v. Gilford, 17 Ill. App.3d 131, 308 N.E.2d 55; People v. Collins, 9 Ill. App.3d 467, 292 N.E.2d 441.) The cases cited by defendant in support of his position are in harmony with the foregoing proposition of law and may be distinguished on factual grounds. See e.g. People v. Crump, 5 Ill.2d 251, 125 N.E.2d 615; People v. Hamby, 6 Ill.2d 559, 129 N.E.2d 746; People v. Bazemore, 25 Ill. 2d 74, 182 N.E.2d 649.

State's witnesses Trull and Anderson both related that Jessie and defendant had been engaged in an argument prior to the shooting, Miss Trull stating additionally that defendant had struck Jessie. The stipulated evidence disclosed the presence

of a fresh laceration on Jessie's face. Anderson further testified that he observed defendant outside the apartment building, eight to ten feet away, at the time Jessie entered the building. When Anderson locked the door, defendant was the only person outside the building in possession of a gun. As soon as the door was shut, Anderson heard a gunshot, was struck in the face by splinters from the bullet hole in the door and later observed Jessie bleeding from his left side. The stipulated evidence further disclosed a bullet hole in the door, blood at the scene, a wound in the left side of the deceased's neck and the death of the deceased from that wound. The testimony given by Miss Trull and Anderson was sufficiently corroborated by other, independent evidence in the case to permit rejection of defendant's contention that their testimony was wholly incredible in light of their addiction to narcotics and their use of narcotics on the date of the shooting.

The further matter raised by defendant in this regard, i.e., that Miss Trull's credibility was adversely affected by her hospitalization for a mental condition stemming from her narcotics habit, is likewise without merit. Defendant's own witness, Dr. Bell, testified that Miss Trull's mental condition did not affect her ability to recall events but only her willingness to relate what she recalled, and that she was competent. It is clear that the trial court was fully aware of Miss Trull's unwillingness to relate the specifics of what had occurred prior to the shooting, which attitude she openly exhibited during the course of her examination. These were matters of credibility for resolution by the trier of fact, and under the circumstances we cannot say that the trial court improperly resolved those matters. Gilford.

Defendant also argues that the State's evidence failed to prove that he fired the fatal shot or that he had entertained



the intention to kill his brother. The evidence, albeit circumstantial, leads to the inescapable conclusion that defendant fired the gun in his possession through the door while entertaining a mental disposition sufficient to have been found guilty of murder.

Section 9-1 of the Criminal Code, under which defendant was convicted, recites in part that a person is guilty of murder when he performs an act without lawful justification which results in the death of another where he either intends to kill or to do great bodily harm to that person, or he knows that such act will cause death to that person or to another. (Ill. Rev. Stat. 1969, ch. 38, par. 9-1.) Intent, being a state of mind, may be proven by the circumstances surrounding and by the character of the actions of the accused. People v. Shannon, 94 Ill. App.2d 110, 236 N.E.2d 369.

In the instant case the State's evidence disclosed that Jessie and defendant had engaged in an argument on the date of the shooting; that defendant struck Jessie; and that defendant was in possession of a gun. The State's evidence further disclosed that Jessie went to the apartment of George Anderson, a long time family friend, and defendant was observed outside the building, a short distance from Jessie, holding a gun. It appears that Jessie, using obscenity, told Anderson to close the door, and that a gunshot was immediately fired through the door. From the manner in which the evidence was presented concerning what was said between Anderson and defendant after the shooting, the court, as the trier of fact, could reasonably have found that Anderson told defendant that he had shot his brother, and that defendant responded by saying that he had better see what he had done. The trial court commented that Jessie told Anderson to close the door "in no uncertain terms"

which also could have led the court to reasonably infer that he was in fear for his life. Finally, when the police arrived after the shooting, the defendant left the scene. The evidence adduced by the State is such as to leave an abiding conviction that defendant shot through the door with the intention of either killing his brother or of committing great bodily harm upon him. People v. Little, 18 Ill. App.3d 1081, 311 N.E.2d 173.

The case of People v. Calhoun, 4 Ill. App.3d 683, 281 N.E.2d 363, cited by defendant in support of his position, is inapposite; the evidence there was compatible with defendant's espoused theory that she accidentally shot the deceased as the latter threw an article at her, causing her to fall backward and discharging a gun which she had been holding. Defendant here offered no evidence which in any manner negated the strong inference of guilt resulting from the State's circumstantial evidence.

Defendant next contends that if he was proven guilty of an offense, the finding should have been guilty of involuntary manslaughter. He argues that no evidence was adduced showing that he deliberately fired the weapon at the door or, if the evidence does disclose such fact, that he knew the exact location of the deceased behind the door when the shot was fired. The foregoing discussion and conclusion, that the State's evidence was sufficient to warrant a finding of guilty of murder, adequately disposes of this contention. The evidence of the argument and altercation between Jessie and defendant prior to the shooting, defendant's carrying the gun with him from one building to another, Jessie's apparent anxiety when he reached the Anderson apartment, and the immediate shooting of the weapon through the door upon its being closed all belie defendant's argument that his act was one of recklessness, giving rise to the offense of involuntary manslaughter rather than of murder. (Ill. Rev. Stat. 1973, ch. 38, par. 9-3.) It is to be further noted that the trial court



denied defendant's post-trial motion requesting a change of finding to that of involuntary manslaughter. The court specifically stated in that regard that defendant's acts "created a strong probability of the death or great bodily harm to . . . Jessie Trull, because of the shortness of the lapse of time between the time he entered the door and the door was closed and the shot was fired."

Defendant cites the case of People v. Felton, 12 Ill. App.3d 201, 298 N.E.2d 372, as authority for his present request for a reduction of the degree of the offense to involuntary manslaughter. In Felton the reviewing court, in reducing the degree of the offense to involuntary manslaughter, noted that the defendant had testified that she fired a shot to frighten the victim. The court further noted that at the time she fired the weapon the exact position of the victim behind the closed door was unknown to her and held that her action in firing the weapon through the door under such conditions constituted recklessness as a "gross deviation from the standard of care which a reasonable person would exercise. . ." and that therefore the degree of the offense should be reduced. In the instant case, however, the fact that defendant fired his gun immediately after the door was closed indicates he knew the position of his victim and intended to cause his death or to inflict great bodily harm.

Defendant's next contention that the trial court improperly limited his attempted impeachment of State's witness Anderson is also without merit.

Defense counsel sought to impeach Anderson by reference to a police report executed by an officer named "Sam" on the theory that Anderson had testified at trial in certain respects contrary to statements allegedly taken from him by the officer at the scene immediately after the shooting. It appears that

Officer Sam was deceased at the time of trial, and that he had been deceased when the State tendered to defendant its list of witnesses on which Sam's name appeared. Defense counsel stated to the court that he was unaware until the day of trial that the officer was deceased, and it appears that the assistant State's attorney was also unaware of his death until that time. Anderson was asked by defense counsel, apparently reading verbatim from the police report, whether he made certain statements attributed to him in the report. Anderson responded, "That is wrong." The trial court refused admission of the report into evidence on the ground that the officer making the report was deceased and could not be called to verify the matters contained therein.

Defendant here argues that the trial court erroneously denied admission of the report to impeach the witness inasmuch as it did not constitute hearsay since impeachment was involved and inasmuch as its competency as evidence was tacitly admitted by the State's surrender of the report to the defendant pursuant to his pre-trial discovery, thereby obviating the need for Officer Sam's testimony to verify its contents.

Whether or not the police report was hearsay is immaterial. The case of People v. Moses, 11 Ill.2d 84, 142 N.E.2d 1, cited by defendant is consequently inapplicable. After State's witness Anderson was read his alleged statement from the report, which he denied making, defendant failed to demonstrate that the statement as read to the witness was either in his own words or otherwise substantially verbatim. (People v. Matthews, 7 Ill. App.3d 1059, 289 N.E.2d 98.) The sole means of demonstrating the competency of the report under the circumstances, apart from Anderson's own admission thereof, which he did not give, was through Officer Sam who was deceased at the time of trial and unavailable for such purpose.

It cannot be seriously contended that by furnishing the police report to defendant pursuant to the pre-trial discovery procedures established under Supreme Court Rule 412, the State vouched for its competency as evidence. (Ill. Rev. Stat. 1973, ch. 110A, par. 412.) Defendant cites no case in support of this proposition, nor has independent research by this court disclosed any such authority. It would unduly extend the scope and purpose of Supreme Court Rule 412 to hold, as defendant now requests, that by complying with that Rule the State waives its right to insist upon the usual requirements and procedures involved in establishing a proper foundation for the admission of such matters for impeachment purposes. See e.g., Matthews.

The cases of People v. Cole, 30 Ill.2d 375, 196 N.E.2d 691, and People v. Cagle, 41 Ill.2d 528, 244 N.E.2d 200, cited by defendant, are not in point. In those cases the competency of the reports was never brought into question, whereas here Anderson's denial of the statements read from the report challenged the competency thereof, placing the burden upon defendant to establish the veracity of the report, which he failed to uphold.

Defendant lastly contends that the trial court committed error in declaring Miss Trull a court's witness. He argues that she should not have been so declared since her testimony did not relate directly to the alleged primary issue before the court, namely, whether he fired the gunshot which killed Jessie.

As noted above, the State's case was entirely circumstantial; all factors leading up to and involving the shooting were consequently in issue. Miss Trull's testimony concerning the altercation between Jessie and defendant, and that concerning the latter's possession of a gun on the date of the shooting, were directly related to those issues.

In People v. Touhy, 361 Ill. 332, 197 N.E. 849, the Supreme Court held proper the trial court's decision to declare as a



court's witness a charwoman who worked in a building where a kidnapping victim had been held for one night of the period of abduction, on the grounds that the State had demonstrated to the court that her testimony was relevant to the case whereas the State could not vouch for her credibility. Likewise in the instant case the record is clear that Miss Trull was an important witness to the events which preceded the shooting, bearing directly upon the issues in the case, whereas the State was unable to vouch for her credibility inasmuch as she was extremely hostile during examination. The court did not abuse its discretion in allowing the State's motion that she be declared a court's witness.

For the foregoing reasons the judgment is affirmed.

AFFIRMED.

Abstract.

26 I.A. 876^{3D}



NO. 59709

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
CARL BENIFIELD, otherwise known)
as CHARLES JOSEPH BENIFIELD,)
(Impleaded),)
)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
ROBERT E. CHERRY,
PRESIDING.

Mr. JUSTICE LORENZ delivered the opinion of the court:

Defendant was found guilty after a jury trial of the crime of armed robbery in violation of section 18-2 of the Criminal Code, (Ill. Rev. Stat. 1971, ch. 38, par. 18-2.) and sentenced to 6 to 18 years. On appeal defendant contends that the identification was doubtful and insufficient to prove him guilty beyond a reasonable doubt.

At trial the following pertinent evidence was adduced.

For the State:

Albert Smith, the complainant

He lived at 3652 S. Federal and on February 20, 1973, at about 2:30 p.m. was in the laundry room of a project apartment building at 3544 S. State, Chicago, Illinois, where he worked as a janitor. He was about to leave the room when two men rushed in and put a coat over his head. He gave the men his money when they demanded it. They then cut his leg with a knife when he claimed he didn't have any additional money. They took \$12, his watch and keys and then fled the room. He had seen the men in the neighborhood, but did not know them personally.

He was questioned by the police at about 3:00 that afternoon at which time he told them that one man was tall and dark and the other man was short. At about 5:00 p.m., while it was still light out, he noticed one of his assailants standing across the street, and took his gun to try and reclaim his money. He got \$2 from the man, Carl Williams, and then called the police who arrested Williams. At the time of the

arrest, he noticed the defendant across the street and told the police, but they did not arrest him then.

He and Williams were taken to the police station and he was charged with unlawful use of weapons for his use of the gun in trying to reclaim his money. The police showed him a mug shot book, and after looking through several pages he picked out a picture of the other assailant, the defendant.

Two days later he saw the defendant standing in front of the building at 3542 S. State. After driving around the block to take a second look, he informed the security guards who called the police. Several investigators came out and arrested the defendant after he identified him. He claimed that he never discussed his testimony in the instant case in relation to the charge for unlawful use of weapons.

On cross-examination he denied he ever told the police he was attacked by three negroes and also testified that neither of his assailants had a mustache.

Chicago Police Officer Robert Dush

On February 20, 1973, at approximately 5:00 P.M. he was called to arrest Carl Williams who Albert Smith observed standing on the street at 3542 S. State and identified as one of the assailants who had robbed him earlier that day. Smith accompanied them to the police facility where he viewed a "mug shot" book and picked out a picture of defendant whom he identified as the other assailant.

Chicago Police Officer Richard Waszkiewicz

On February 22, 1973, he received a call from Smith informing him that defendant was standing in front of 3542 S. State. He went there and arrested defendant after an identification was made by Smith.

On cross-examination he stated that defendant gave his address as 3651 S. Federal which is one half block from where the robbery took place. He also testified that the picture of defendant with a mustache accurately portrayed his appearance on the day of the arrest.

For the defense:

Chicago Police Officer Robert Dush

Having been recalled as a defense witness he testified that on the afternoon of the incident the complainant gave a verbal account of the incident in which he claimed three persons accosted him. He also said Smith did not request him to arrest any other person during the arrest of Williams later that day.

Chicago Police Officer Thomas Fortuna

On February 20, 1973, Smith told him that he was attacked by three men he had seen in the neighborhood and that one of the men had a grey coat which was thrown over his head. Smith said he couldn't see the man clearly, but that his buddies would take care of them if they knew who they were.

OPINION

Defendant contends that the identification of him as one of the assailants was doubtful and insufficient to prove him guilty beyond a reasonable doubt. He bases his argument on the fact that the opportunity for definite identification was extremely limited because the victim only had a few seconds in which to view the assailants before his head was covered and further that the victim testified that neither of his assailants had a mustache at the time of the occurrence while defendant claims he had a mustache at this time.

Defendant relies upon cases (People v. Cullotta, 32 Ill.2d 502, 505, 207 N.E.2d 444; People v. Gold, 361 Ill.2d 196 N.E.729.) wherein our Supreme Court held that a conviction cannot be deemed to be sustained by evidence beyond a reasonable doubt if the identification of the accused was vague, doubtful or uncertain.

However, such is not the case here. Although Albert Smith never gave a description of defendant's facial feature including his mustache, Smith did see his assailants including the defendant face to face in a lighted area from a few feet away. He had seen the defendant previously because they had lived across the street from one another. He identified defendant twice within two days following the robbery. On the evening of the occurrence, he picked out defendant's photograph from a mug shot book. Two days later under daylight conditions he again

identified defendant who was standing on the street in front of a building which adjoined the building where the robbery took place.

The sufficiency of the identification is a question to be determined by the trier of fact and its finding of guilt will not be disturbed except where the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. People v. Hampton, 44 Ill.2d 41, 45, 253 N.E.2d 385.

The testimony of a single witness if it is positive and the witness is credible is sufficient for a conviction. (People v. Cooper, 9 Ill.App.3d 291, 296, 292 N.E.2d 79.) Furthermore, precise accuracy in describing facial characteristics and wearing apparel is unnecessary where an identification is positive. People v. Bell, 18 Ill. App. 3d 130, 309 N.E.2d 344 (abst.only); People v. Winfrey, 11 Ill. App. 3d 164, 298 N.E.2d 413.

The basic discrepancy in Smith's testimony relates to the defendant's mustache. Smith testified that neither of his assailants had a mustache. However, defendant's picture taken on his arrest two days after the occurrence of the robbery shows him with a mustache.

In view of the other definite and positive identification which Smith testified to, the failure by Smith to include a mustache as an identifying feature does not render his testimony so inaccurate and unsatisfactory as to leave a reasonable doubt as to defendant's guilt. (People v. Guyton, 53 Ill. 2d 114, 118, 290 N.E.2d 209.) It is merely one item that the jury could consider in regard to Smith's credibility.

In the present case, a jury heard all the evidence and found that the defendant was guilty beyond all reasonable doubt. We find no reason to disturb that finding.

The judgment is affirmed.

Affirmed.

DRUCKER and SULLIVAN, JJ., concur.

[Publish abstract only.]

261A^{3D} 912



59811

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.)	
	)	HONORABLE
EUGENE MICHAEL DAVISON,	)	ARTHUR L. DUNNE,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM (First Division, First District).

Before GOLDBERG, J., EGAN, J. and SIMON, J.

Eugene Michael Davison, defendant, was found guilty after a bench trial of the crime of armed robbery (Ill.Rev.Stat. 1971, ch. 38, par. 18-2). He was sentenced to a term of four years to four years and one day. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, Herbert Burrows testified that on July 28, 1972, he and his wife resided in the rear of the tavern at 141 South Troy, Chicago, Illinois. At approximately 11:55 a.m., he was in the tavern when the defendant, armed with a shotgun, and two other men, armed with a pistol and a shotgun, entered the tavern and announced a holdup. During the robbery, which took approximately ten minutes, the men took \$650 from Mr. Burrows and \$100 from the barman. After the men left the tavern, the police were immediately called. On August 11, 1972, Mr. Burrows viewed a line-up of four men and identified the defendant as one of the robbers. Mr. Burrows testified that in August, 1973, defendant came into his tavern and gave him \$350. Thereafter, defendant gave him an additional \$400. Defendant stated that he wanted to get clear of the crime, so he was repaying the money taken in the robbery.

On cross-examination, Mr. Burrows testified that he had known the defendant's family for many years and has known the defendant since he was a child. Mr. Burrows stated that he told



the police that he had known the defendant since he was a little boy and that he could identify him if he ever saw him again. Mr. Burrows stated that he did not know the defendant's address or his name and, therefore, did not give the police this information. Between the robbery and defendant's arrest, Mr. Burrows saw defendant in his car on two occasions but the car drove off before Mr. Burrows could contact the police.

Leola Louis testified that on July 28, 1972, she was in the lounge located at 141 South Troy Street, Chicago, Illinois. At approximately 11:55 a.m., the defendant, carrying some kind of a rifle, and two other armed men entered the tavern and announced a holdup. The men took approximately \$58 from her. Miss Louis testified that prior to the incident she had seen the defendant and knew where he lived, since she had delivered mail there in her capacity as a letter carrier for the U.S. Post Office. Miss Louis testified that she did not tell the police the defendant's name or address.

Wanda Burrows testified that she and her husband, Herbert Burrows, lived behind the tavern at 141 South Troy, Chicago, Illinois. On July 28, 1972, at approximately 11:55 a.m., she was in the rear of the tavern when she heard a loud noise in the front. Shortly thereafter, she was pulled into the tavern by a man armed with a shotgun. At that time she observed the defendant, also armed with a shotgun, and two other men robbing the tavern. The robbery took approximately ten minutes. Mrs. Burrows testified that on August 11, 1972, she observed the defendant driving a blue Mustang. She took down his license number and conveyed this information to the police. The same day she was called to the police station, where she viewed a line-up of four men and identified the defendant as one of the robbers.

James Branick, a Chicago police investigator, testified that he was assigned the investigation of the armed robbery which occurred on July 28, 1972, at 141 South Troy, Chicago, Illinois.

On August 11, 1972, pursuant to information received from Mrs. Burrows, he placed the defendant under arrest. Both Mr. and Mrs. Burrows viewed a line-up of four men at Area 4 Robbery headquarters and identified the defendant as one of the robbers.

Eugene Davison, defendant, testified that on July 23, 1972, he was not at any time in the tavern at 141 South Troy Street, Chicago, Illinois. Defendant stated that after he was placed under arrest on August 11, 1972, he had a conversation with his mother. Thereafter, he went to the tavern and informed Mr. Burrows that he understood from his mother that Mr. Burrows was not sure of the identification of him as the robber, but went along because Burrows' wife had identified him. Defendant stated that he agreed to pay Mr. Burrows all the money taken in the robbery so that he would not be convicted of a crime he did not commit.

In rebuttal, Herbert Burrows testified that subsequent to the robbery he had a conversation with the defendant's mother. Mr. Burrows denied ever telling the defendant's mother that he was not sure about his identification.

Defendant's only contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Defendant argues that the identification testimony was insufficient and that his testimony was positive and credible. The prosecution has the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. Where the identification of a defendant is doubtful or uncertain, the prosecution has not met its burden and the conviction will be reversed. (People v. Bennett, 9 Ill.App.3d 1021, 293 N.E.2d 687.) However, an identification by one witness to a crime can be sufficient to justify a conviction, even where contradicted by the accused. (People v. McVet, 7 Ill.App.3d 381, 287 N.E.2d 479.) In a bench trial, the credibility of witnesses and the weight to be given their testimony are normally questions for the trier of fact and his decision will not be reversed on appeal unless it is so unsatisfactory as to leave a



reasonable doubt as to defendant's guilt. People v. Clark, 52 Ill. 2d 374, 288 N.E.2d 363.

In the case at bar, Herbert Burrows, Wanda Burrows and Leola Louis testified that on July 28, 1972, at approximately 11:55 a.m., defendant and two other men, armed with two shotguns and one pistol, robbed the tavern. During the robbery, which took approximately ten minutes, each of the witnesses had an ample opportunity to view the defendant so as to fix his identity. Two of the witnesses testified that they had previously known the defendant. Several weeks after the incident, Mrs. Burrows observed the defendant driving down the street and upon recognizing him as one of the robbers, she immediately took down his license number and telephoned the police. Defendant was arrested and both Mr. and Mrs. Burrows identified him out of a line-up consisting of four men. While the defendant now argues that doubt is cast upon his identification by Mr. Burrows and Miss Louis since they testified that prior to the incident in question they knew the defendant but did not inform the police of that fact, this at best raises the question of credibility which is for the trier of fact to determine. In addition to the identification testimony the court could infer guilty knowledge on the defendant's part from his admitted payment of money to the complainant. (People v. Perry, 21 Ill.App.3d 18, 23, 315 N.E.2d 173.) Defendant's testimony that he did not commit the crime does not raise a reasonable doubt as to his guilt since the trial judge is not obliged to believe defendant's testimony. (People v. Kaprelian, 6 Ill.App.3d 1066, 286 N.E.2d 613.) After a complete review of the entire record, we conclude that the evidence adduced by the State was sufficient to establish defendant's guilt beyond a reasonable doubt.

Accordingly, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

3D
261.A. 913



60201

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
JAMES COLE (IMPLEADED),	)	HON. EARL E. STRAYHORN,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

James Cole (defendant) was indicted with three codefendants for murder (Ill. Rev. Stat. 1969, ch. 38, par. 9-1) and four counts of attempt armed robbery (Ill. Rev. Stat. 1969, ch. 38, par. 8-4.) After a jury trial, defendant was found guilty of all offenses. He was sentenced to concurrent terms of 30 to 60 years for murder and 7 to 20 years for each of the attempt armed robberies.

On his appeal he contends:

1. It was error to deny the motion to suppress his involuntary oral statement;
2. It was error to allow testimony that he refused to make a written statement after being advised of his rights;
3. It was error to deny his motion for a severance when his codefendants asserted an antagonistic defense;
4. It was error to convict him of five offenses arising out of the same conduct;
5. The sentence was excessive.

Before trial, the defendant filed a motion to suppress an oral statement made subsequent to his arrest. At the hearing conducted on this motion, the following testimony was given.

Rutherford Wilson, a Chicago police officer, testified that he and his partner, Robert L. Tyson, went to the home of defendant's sister and placed defendant under arrest. This arrest, pursuant to a warrant, occurred on July 17, 1971, and was arranged by defendant's father. Officer Wilson informed the defendant of his Miranda rights before they entered the police car and again upon reaching the police station. The defendant indicated he understood these admonitions. Officer Wilson did not observe anything unusual about defendant's physical appearance or his manner of speech or movement. He did not do anything physical to defendant and he did not threaten him in any way. Further, he did not see or hear any other officer physically or verbally threaten defendant. He questioned defendant concerning the murder for about one hour. Defendant related what he knew but refused to give a written statement.

Officer Wayne White testified that he entered the room in which defendant was seated while at the police station. He noticed nothing unusual about defendant's appearance or his manner of speech, although he did detect a slight odor of alcohol. He denied grabbing defendant from a chair and slapping him, and claimed that neither he nor anyone else threatened or abused defendant or promised him anything.

Officer Robert L. Tyson testified that his partner advised defendant of his Miranda rights on the way to the police car and again at the police station. The defendant indicated that he understood his rights. Although defendant gave an oral statement, he refused to give a written statement. Officer Tyson testified that neither he nor his partner struck or threatened the defendant and that Officer White did not grab, strike or slap him.

The defendant testified that he did not remember being informed of his rights on the way to the police car. When asked if he wanted to make a written or oral statement, he told the officers

that he didn't want to make a statement at all. He testified that Officer White pulled him from his chair, slapped him and pushed him down when he indicated he did not wish to make a statement. He subsequently made an oral confession.

After presentation of this evidence, the trial court denied defendant's motion to suppress his oral confession. Defendant then requested a severance by a petition which alleged that the written and oral statements of two of his codefendants would prevent a fair trial. This motion was also denied by the trial court.

At trial, the evidence established that on July 14, 1971, an attempt armed robbery occurred in a tavern and connecting Chinese restaurant resulting in the death of Henry Dale, a United States Marshal. The pertinent testimony for purposes of this appeal follows.

Henry Brown testified that he was at Duke's Lounge around 11:00 p. m. on July 14, 1971. The lounge is connected to a Chinese restaurant by a passageway. He indicated the lighting in the lounge was good. While seated at the bar, he noticed a man enter the tavern and take a seat a few feet from him. This man was positively identified by him as the defendant, James Cole. He observed a second individual, who wore a wide-brimmed white hat, step opposite him, slap one of the patrons and announce a "stick-up". The defendant had stepped back from the bar and held a pistol in his hand. The other man, who this witness identified as Hiram Brown, (one of the codefendants), walked around the bar and entered the Chinese restaurant through the connecting passageway. This witness heard some shots and Hiram Brown returned to the tavern and ordered everyone to lie on the floor. The robbers then fled; and, upon entering the Chinese restaurant, this witness saw two wounded men, one an offender, and the other a deputy marshal.

Ernest Cross testified that he was at Duke's Lounge when the attempt armed robbery occurred. About 20 minutes after his arrival,

he heard someone announce a robbery. He saw a man, holding a gun in his hand and wearing a white hat, step to the west side of the tavern. A few minutes later he heard some shots and was ordered to lie down on the floor. After the robbers left he saw a young man lying in a pool of blood, became nervous and left.

Amy Yung testified that she operated the Chinese restaurant connected to Duke's Lounge. Henry Dale, a deputy marshal, was present in her restaurant when a young man entered with a gun and ordered her to go to the lounge. A few minutes later she heard some shots and saw the man she had earlier seen with a gun lying by the entrance to the passageway.

Dr. Jerry Kearns, a pathologist for the Cook County Coroner's Office, performed an autopsy on the body of Henry Dale on July 15, 1971. He concluded that the cause of death was a bullet wound to the brain.

Barbara Nixon testified that she was employed at Duke's Lounge as a barmaid on the evening of July 14, 1971. She identified defendant as the man who had seated himself near Henry Brown. He went to the cigarette machine and, when he returned, another man wearing a white hat announced a robbery. Defendant then said, "Yes, this is a stick-up" and pulled out a hand gun. She was able to see into the Chinese restaurant and witnessed Henry Dale shoot a man holding a shotgun. The man in the white hat, later identified as Hiram Brown, then stepped to the passageway and shot at Henry Dale. She saw Dale fall to the floor. The man in the white hat then ordered everyone to lie on the floor.

Herman Slater testified that he was working as a bartender at Duke's Lounge. At about 11:30 p. m. a robbery was announced. He saw a man standing six or seven feet from him, wearing a white hat and holding a gun in his hand, who ordered everyone to lie on

the floor. He identified this man as Hiram Brown. He heard about ten shots, which sounded as if they came from different weapons. One of the men said a policeman had been shot. This witness saw another man with a gun in his hand, but was unable to identify him.

In addition to restating his testimony given at the hearing on the motion to suppress, Officer Wilson testified that defendant related the facts surrounding the murder to him and his partner. Defendant told them that he and four other men went to Duke's Lounge with the intention of holding it up. After positioning himself inside the lounge, he ordered a beer and waited for a signal. Hiram Brown announced a holdup and at that time defendant pulled out his pistol. While attempting to rob the patrons, defendant heard some shooting from the restaurant side of the bar. The men panicked and left the tavern. Defendant stated that he later learned that two men were killed during the attempted robbery.

The written confession of another codefendant, Cornell Moon, was read into the record in the presence of the jury. In substance it stated that he, along with seven others, met at his sister-in-law's house, secured weapons and then went to Duke's Lounge. Moon was armed and the man next to him, realizing that a robbery was in progress, produced a gun of his own. Moon wrestled the gun from this person and told him to "***BE COOL." A shooting then occurred on the restaurant side of the tavern. Hiram Brown told Moon that one of their companions had been shot and, in turn, he, Brown, had shot someone. The men then left.

Moon testified at trial in his own defense. His testimony did not coincide with the above related confession. He testified that he tried to hide so he would not have to accompany Hiram Brown when the latter called for him on the night of the shooting. Because he feared Hiram Brown, he ultimately did accompany him to the lounge. Once at the tavern he tried to leave but Brown forced

him to return. He claimed he did not hear anyone announce a robbery and was outside when the shooting occurred. He further denied taking a gun from anyone that evening.

On cross-examination he stated that he did take a gun from one of those present in the tavern but only in order to appease Hiram Brown. He testified that one of the accomplices was the defendant, James Cole, who had announced the stickup.

The defendant elected not to testify in his own defense. The jury returned verdicts of guilty on all counts of the indictments.

Defendant first contends that the trial court erred in denying the pretrial motion to suppress his confession. At the hearing conducted on this motion, he testified that Officer White slapped, threatened and ordered him to cooperate with Officers Wilson and Tyson. He thus maintains that his incriminating oral statements were the product of physical coercion and, therefore, involuntary. It is true that statements made during a custodial interrogation are inadmissible unless defendant knowingly and voluntarily waives his right to remain silent. (Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602.) Officers Wilson and Tyson, however, testified that defendant was informed of his Miranda rights and indicated his understanding thereof. They also testified that defendant was not physically threatened or harmed by them and that he was not mistreated by Officer White. The latter also denied having slapped or threatened defendant.

In deciding the question of admissibility, the court need not be convinced beyond a reasonable doubt of the voluntary character of a confession. The court's determination will not be disturbed upon review unless it is contrary to the manifest weight of the evidence. (People v. Prim, 53 Ill. 2d 62, 70, 289 N.E.2d 601.) Here the testimony by two officers directly contradicted the

defendant's testimony and the resolution of this conflicting evidence was for determination by the trier of fact. The trial court, having observed and heard the witnesses, is in a far better position than a reviewing court to weigh the evidence. The defendant's testimony of physical coercion and force was not corroborated by any other evidence in the record. Although defendant points out contradictions in the testimony of the police, we find here at best only minor discrepancies which raise simply an issue of credibility. The court was under no duty to accept defendant's testimony in place of that of the police officers. The court found defendant's oral confession was voluntary and we cannot conclude that this determination was against the manifest weight of the evidence. People v. Pittman, 55 Ill. 2d 39, 52, 302 N.E.2d 7; People v. Higgins, 50 Ill. 2d 221, 225, 278 N.E.2d 68.

Defendant made a pretrial motion for severance supported by a petition. He alleged that the codefendants had made statements implicating him and that their defenses were inconsistent and antagonistic with his. The court denied this motion. In this court, defendant points out that the codefendant, Cornell Moon, had signed a written statement admitting his participation in the crime and also implicating defendant.

It is accepted and established practice in this jurisdiction that where several "defendants are jointly indicted they are to be tried together, unless the trial court in the exercise of sound discretion considers that separate trials should be granted." (People v. Canaday, 49 Ill. 2d 416, 424, 275 N.E.2d 356 and cases there cited.) "The paramount inquiry is whether the defenses are of such an antagonistic nature that a severance is imperative to insure a fair trial. [Citations.]" (People v. Canaday, 49 Ill. 2d 416, 424 citing from People v. Gendron, 41 Ill. 2d 351, 356, 357, 243 N.E.2d 208.) Therefore, it has been stated that it is .

necessary for the party who moves for a severance to show the court how he would be prejudiced by a joint trial. People v. Meisenhelter, 381 Ill. 378, 45 N.E.2d 678.

In the case at bar, the court required the State to strike out from the statement of Cornell Moon any reference to defendant. Thus, when the statement was read to the jury, defendant's name was not mentioned. In addition, the court gave proper and sufficient cautionary instructions to the jury. (See IPI-Criminal, page 24, No. 3.07 and page 25, No. 3.08.) These precautions should have prevented any prejudice to defendant from the Moon statement.

We also note that defendant made an oral admission comprising substantially the same facts as contained in Moon's written statement. Thus, in any event, the Moon statement was merely cumulative. This fact operates to differentiate the case at bar completely from situations such as presented in Bruton v. United States, 391 U. S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620. Note the careful analysis by the Supreme Court of Illinois in People v. Rosochacki, 41 Ill. 2d 483, 492, 493, 494, 244 N.E.2d 136, showing that in Bruton the confession of the accomplice, which inculcated defendant, had been secured in violation of Miranda and, on a retrial, the accomplice had been acquitted. In Rosochacki, there were oral and written statements by the defendant which were substantially similar to the written statement of the codefendant and other evidence was convincing and plainly adequate to support the verdict. In the case before us, defendant made no written statement but his properly taken oral statement serves much the same purpose. Also we have here strong and most convincing evidence of guilt and defendant has made no point on the sufficiency of the proof beyond a reasonable doubt. Note also the recent decision of the Supreme Court citing Rosochacki and reaching the same result. (People v. Stock, 56 Ill. 2d 461, 473, 309 N.E.2d 19.) The trial court properly exercised its discretion in denying the motion for severance.

Defendant's next contention revolves about the testimony of Officers Wilson and Tyson on direct examination that he refused to give them a written statement. Defendant urges that this testimony was improper as a violation of his Miranda rights. The record shows that no objection of any kind was made by defendant to this testimony at trial. Therefore, he has waived the right to raise the contention on appeal. (People v. Dukett, 56 Ill. 2d 432, 442, 308 N.E.2d 590 and decisions there cited.) Furthermore, defendant himself actually developed and stressed this same fact in cross-examination of both of these police officers. This was an attempt by defendant to convince the jury that the officers' recollection of his oral statements made months prior to trial was not as reliable as a written statement would have been. In addition, defendant's attorney actually argued to the jury that, since no notes and no verbatim record of defendant's interrogation had been made, the officers' recollection of what took place could not be accurate. Therefore, even aside from waiver, defendant is in the untenable position of attempting to "assign error to that which he acquiesced in and gave the court no opportunity to correct." People v. Smalley, 10 Ill. App. 3d 416, 426, 294 N.E.2d 305.

Defendant next complains that the concurrent sentences for murder and attempt armed robbery were improper since they resulted from conduct which arose from a single transaction. Defendant allegedly produced a weapon and announced a stickup, and he argues that this conduct constituted a single act so that other offenses were not independently motivated or otherwise separable.

A defendant may not be sentenced for more than one offense where two or more offenses result from the same conduct. (People v. Schlenger, 13 Ill. 2d 63, 147 N.E.2d 316 and People v. Brown, 14 Ill. App. 3d 196, 302 N.E.2d 101.) "Conduct" is defined as

"an act or a series of acts, and the accompanying mental state." (Ill. Rev. Stat. 1973, ch. 38, par. 2-4.) Defendant's motivation is also a significant factor. People v. Stewart, 45 Ill. 2d 310, 259 N.E.2d 24; People v. Siqlar, 18 Ill. App. 3d 381, 383, 309 N.E.2d 710.

Nothing in the record suggests that the acts which made defendant accountable for murder were independently motivated or otherwise separable from the acts and conduct which constituted the offense of attempt robbery. "The entire 'series of acts' were a part of 'the same transaction'***." (People v. Stewart, 45 Ill. 2d 310, 313, 259 N.E.2d 24.) Accordingly, only one sentence is proper in this case. Henry Dale, the deceased, was apparently attempting to foil the effort to rob the tavern and adjoining restaurant. See People v. Prim, 53 Ill. 2d 62, 73, 289 N.E.2d 601.

In its brief, the State properly concedes that the defendant's sentences on all four judgments of guilt of attempt armed robbery must be vacated. It argues, however, that the accompanying convictions (as distinguished from the sentences) resulting from a single course of conduct directed against more than one victim should be affirmed. In People v. Lilly, 56 Ill. 2d 493, 309 N.E. 2d 1, the defendant was charged with rape and indecent liberties. The jury returned guilty verdicts on both counts, but the trial judge sentenced the defendant only on the charge of rape, since he found that both verdicts were based on a single act. The Supreme Court vacated the judgment of conviction on the lesser offense of indecent liberties as it alone could operate to the defendant's prejudice even though no sentence was imposed. The court stated, "police records, including fingerprint reports, well might carry notations of what will appear to be convictions of separate and unrelated crimes of rape and indecent liberties." (56 Ill. 2d 493, 495.) This rationale is equally applicable to the case before us. Thus the judgment appealed from insofar as it included judgments

of conviction and sentences for four offenses of attempt armed robbery is improper and these judgments are reversed and sentences are vacated.

Finally, defendant contends that the sentence imposed for the offense of murder is excessive. He argues that the Illinois Unified Code of Corrections provides that the minimum term for murder shall be 14 years unless aggravating circumstances exist allowing the imposition of a larger minimum sentence, and that no such circumstances are present here. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(c)(1).) We disagree. This murder was the result of a well planned crime. The defendant acted together with his codefendants; he knew that the others were armed; was himself armed with a pistol; and knew, or certainly should have known, that violence and death were likely to result from his conduct. It has been repeatedly held that where a defendant claims the sentence imposed is excessive, though within the limits prescribed by the legislature, that sentence should not be disturbed unless it is greatly at variance with the purpose and spirit of the law. The trial court is in a far better position during the trial and the hearing in aggravation and mitigation to make a sound determination as to the punishment to be imposed than are courts of review. (People v. Sprinkle, 56 Ill. 2d 257, 307 N.E.2d 161; People v. Hampton, 44 Ill. 2d 41, 253 N.E.2d 385; People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673.) We find no reason to disturb the sentence imposed by the trial court. Compare People v. Prim, 53 Ill. 2d 62, 289 N.E.2d 601.

For the reasons given, the judgment of conviction and the sentence imposed for murder are affirmed; the four judgments of conviction for attempt armed robbery are reversed, and the sentences of the circuit court thereon are vacated.

AFFIRMED IN PART, REVERSED
AND VACATED IN PART.

EGAN, J., and SIMON, J., concur.

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261A 953



No. 60111

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	_____
)	
STEVEN BROWN,	)	HONORABLE
	)	MAURICE LEE
Defendant-Appellant.	)	PRESIDING.

BEFORE STAMOS, LEIGHTON and HAYES, JJ.

Per Curiam

Steven Brown, defendant, was found guilty after a bench trial of the offenses of attempt theft and criminal damage to property, in violation of sections 8-4 and 21-1(a) of the Criminal Code, respectively, and sentenced to concurrent terms of thirty days in the House of Correction. (Ill. Rev. Stat. 1971, ch. 38, pars. 8-4, 21-1 (a).) His sole contention on appeal is that the State failed to prove his guilt beyond a reasonable doubt for the reason that the evidence merely established his presence at the scene of the alleged offenses.

A City of Chicago police officer testified for the State that at about 4:30 p.m. on May 21, 1973, he and his partner responded to a call of a break-in upon the "piggy-back" cars at the Penn Central Railroad yard at 53rd Street and Princeton Avenue. The officer was dressed in uniform and riding in a marked police vehicle, and upon his arrival at the scene he observed three or four male youths jump and run from the cars. The officers pursued the youths and apprehended and arrested the defendant and another of the youths in the 5200 block of Princeton Avenue after a ten-minute chase, during which period the latter were continuously in the officer's sight; the defendant had sat down prior to his apprehension. Upon his return to the scene, the officer inspected the car from which the

defendant had jumped and observed the door seals to the trailers broken and several boxes of merchandise missing and broken.

A lieutenant on the Penn Central Railroad security force testified for the State that he did not give defendant permission to go upon or into the cars belonging to Penn Central and that the cars with the piggy-back trailers had been secure; the security officer commenced his tour of duty that day at 4:00 p.m., but the first occasion that he had to observe the cars in question was when he was called to the scene after the incident. The witness was uncertain whether anyone else had told the defendant that "they" could not go upon the railroad cars.

Defendant testified in his own behalf that he had been in the general area in question, waiting with several other youths to go to baseball practice at 4:00 p.m. in a park some six or seven blocks distant. He observed three youths in the railroad yard, after which the police arrived in a police vehicle and placed him under arrest. He was not on the railroad property when the officers arrived, and he denied being on the railroad car in question or taking anything from the trailer. Two witnesses testified for defendant, that they had seen him about 4:00 p.m. that day, at which time they left the area, and that they observed his arrest about 4:30 p.m.; they did not see defendant upon the railroad car.

Defendant argues that the State failed to produce any occurrence witnesses or to show that he had at any time been in the possession of the merchandise from the trailers, and that the State failed to establish how the security officer had known that the car in question had been secure or for how long prior to the incident it had been secure.

At the conclusion of the evidence, the trial court commented that it believed the State's witnesses and that it disbelieved

the evidence adduced by the defense. The record discloses sufficient evidence adduced by the State from which the trier of fact could reasonably have found the defendant guilty as charged, upon resolution of the conflicts in the evidence and a determination of the weight to be accorded the witnesses, and upon consideration of the defendant's evidence which contained several conflicts and inconsistencies. People v. Morehead (1970), 45 Ill. 2d 326, 259 N. E. 2d 8; People v. Rav (1967), 80 Ill. App. 2d 310, 316, 225 N. E. 2d 467.

A police report had been received of a break-in on the piggy-back cars belonging to Penn Central Railroad, which were located on that property; the defendant had been observed by uniformed police officers, who were riding in a marked police vehicle, jumping from a railroad car, on which was situated a trailer which had been broken into, and running from the scene; some of the merchandise from the trailer was missing and broken; and the railroad cars had been secure prior to the incident. Defendant's flight from the scene may therefore be considered along with the other evidence in a determination of guilt. (People v. Harris (1970), 124 Ill. App. 2d 234, 260 N. E. 2d 325.) The fact that the security officer did not relate the length of time during which the railroad cars had been secure prior to the incident or how he had known that they were in such condition goes only to the weight of his testimony, which was for resolution by the trier of fact; the reasonable inference from all the evidence adduced is that the railroad cars had been secure immediately prior to the incident.

The cases cited by defendant in support of his position are distinguishable from the instant situation: People v. Washington (1970), 121 Ill. App. 2d 174, 257 N. E. 2d 190; People v. Boyd (1959), 17 Ill. 2d 321, 161 N. E. 2d 311; People v. Lewis (1968), 97 Ill. App. 2d 255, 240 N. E. 2d 459.



A matter which has not been raised on appeal but which may be noticed by this court as plain error under the authority of Supreme Court Rule 615 (a), concerns the conviction of defendant for two offenses which arose out of the same conduct. Ill. Rev. Stat. 1973, ch. 110A, par. 615 (a).

The criminal complaint in the instant case charging the offense of criminal damage to property specifically alleges as the basis of that charge the breaking of the seals on the doors to the trailers. The criminal complaint charging the offense of attempt theft relates to the merchandise inside those trailers. It is clear from the evidence adduced by the State that the defendant and his companions were bent upon theft of the merchandise inside the trailers; boxes from inside the trailers were missing and broken. There is, however, no evidence which demonstrates that the entry into the trailers was made for any purpose other than the anticipated theft, whereas the unauthorized entry into those trailers forms the basis of the charge of criminal damage to property. From the evidence adduced it cannot be determined that the two offenses charged were separate and distinct from each other, and we must therefore conclude that they arose out of the same conduct. See People v. Williams, ___ Ill. 2d ___, ___ N. E. 2d ___ (#44031, January 30, 1975), and People v. Delaney (1974), 19 Ill. App. 3d 731, 312 N. E. 2d 721 (abst.) The conviction and sentence for the offense of criminal damage to property must therefore be vacated.

For these reasons the judgment entered upon criminal complaint #73-MC1-H288254, charging criminal damage to property, is vacated; the judgment entered upon criminal complaint #73-MC1-H288255, charging attempt theft, is affirmed.

Judgment in 73-MC1-H288254
vacated.
Judgment in 73-MC1-H288255
affirmed.

Abstract only.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L. L. RECHENMACHER, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On March 31, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

MAR 31 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
THOMAS ROBERT LUNDBLADE,)
)
Defendant-Appellant.)

Appeal from the
Circuit Court of
the 17th Judicial
Circuit, Winnebago
County, Illinois.

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Represented by retained counsel, defendant, after waiver of indictment, was charged with arson as laid in an information. He later entered a negotiated plea of guilty and was sentenced for a term of 2 to 20 years.

Defendant here questions the sufficiency of the information and the admonishments given him under Supreme Court Rules 401(b)(1),(3) and 402(a)(1). (Ill. Rev. Stat. 1971, ch. 110A, §401(b)(1),(3) and §402(a)(1).) Taken with the case was defendant's motion for summary reversal and the State's motion to dismiss the appeal.

The defendant contends that the information is void for failure to include the phrase "without his consent" as set forth in the statute. (Ill. Rev. Stat. 1971, ch. 38, §20-1.) Pending

this appeal, defendant filed a petition for writ of habeas corpus in the circuit court of Randolph County, stating, for the same reason, that the information was invalid. The petition was dismissed and on appeal, the Fifth District affirmed the decision of the circuit court. (People ex rel. Lundblade v. Israel, 22 Ill. App. 3d 201 (1974); see also People v. White, 22 Ill. App. 3d 206 (1974).) Defendant's contention therefore has already been resolved.

The defendant also contends that his waiver of indictment and plea of guilty were not understandingly made in that the trial court in both instances failed to properly admonish him of the nature of the charge. The defendant concedes that he was admonished as to the nature of the charge in the language of the information. His argument is based on the fact that the admonitions failed to include the element that the act was committed "without the consent" of the owner of the damaged property. Having concluded that the information was legally sufficient, this contention must fall.

Defendant asserts that his waiver of indictment was not understandingly made in that the court failed to advise him that he had a right to be prosecuted only after indictment by a grand jury. The record shows that after informing the defendant of the nature of the charge and the possible minimum and maximum sentence, the trial court explained at length what it meant to waive the grand jury. Defendant was then asked if, knowing this, he still wished to waive the intervention of the grand jury and he replied, "Yes."

As stated in People v. Bishop, 19 Ill. App. 3d 56, 59-60 (1974):

"***[T]here is no requirement that the court make a specific finding or elicit a specific expression of understanding where the record in its entirety shows that the waiver of indictment was intelligently, understandingly and voluntarily made."

Here, no argument is raised that the defendant, represented by counsel, was ignorant of his right to be indicted by a grand jury or that he was harmed or otherwise prejudiced by the failure of the court to refer expressly to the grand jury indictment as a right. Accordingly, we find that the record in its entirety fails to show that the trial court committed any error by not using the specific expression, "right to grand jury indictment." See People v. Bassett, (Gen. No. 73-245/247, 2d Dist.) ___ Ill. App. 3d ___ (1975).

Because of these holdings, the motions taken with the case are denied.

Judgment affirmed.

RECHENMACHER, GUILD, J.J. - concur

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice

Honorable WILLIAM L. GUILD, Justice

Honorable ALBERT E. HALLETT, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On March 31, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

FILED

MAR 31 1975

LOREN A. STROIZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) Appeal from the 15th
) Judicial Circuit
v.)
) Stephenson County, Illinois
)
NORMAN WILLIAM SMEATHERS,)
)
Defendant-Appellant.)

MR. JUSTICE GUILD delivered the opinion of the court.

On March 29, 1973 defendant pled guilty to a charge of theft of property exceeding \$150 and was sentenced to a term of 2-6 years imprisonment. On direct appeal to this court the conviction was affirmed. People v. Smeathers, Docket # 73-162, filed February 14, 1975, Rechenmacher, J.

Defendant filed a pro se post-conviction petition which was later amended by appointed counsel. Therein defendant contended that his sentence was excessive and disparate when compared to the sentences given to the other individuals involved in committing the offense; that certain of the participants were allowed to clear themselves through the taking of a polygraph examination while the defendant was denied the opportunity to so clear himself; and that the entire procedure, including the sentencing, constituted cruel and unusual punishment in that the sentence inflicted "psychological warfare" upon the petitioner and his wife.

Defendant was afforded a full evidentiary hearing on the issues raised in the amended petition and, on October 23, 1973 the trial court denied defendant's petition for post-conviction relief.

The trial court appointed the Illinois Defender Project,

Second Judicial District, to represent the defendant in this appeal from the denial of post-conviction relief. The Deputy Appellate Defender has filed a motion in this court to withdraw as counsel for the defendant in this appeal because the appeal is without merit. The defendant has been notified of this motion and given an opportunity to file additional material on his behalf. No additional material has been so filed.

At the time appointed counsel filed his motion to withdraw, defendant had a direct appeal from his conviction pending before this court. Subsequently, as noted above, an opinion in that appeal has been recently filed affirming defendant's conviction. It is a familiar and sound principle of Illinois law that when review is obtained by a direct appeal, the judgment of the reviewing court is res judicata not only as to those issues actually raised on appeal but also as to those issues which could have been raised but were not. (People v. Weaver (1970), 45 Ill.2d 136, 256 N.E.2d 816.) The contentions which defendant urged in his amended post-conviction petition, and which counsel has considered in his motion to withdraw, could have been raised on direct appeal. The failure to do so results in a waiver of those issues.

Notwithstanding such waiver, we will briefly consider defendant's contentions.

First, a claim of excessive sentence which is within the statutory limits raises no issue cognizable under the Post-Conviction Hearing Act. (People v. Ballinger (1973), 53 Ill.2d 388, 292 N.E.2d 400.) Defendant's sentence of 2-6 years was within the statutory limits for the offense of theft of property exceeding \$150. See Ill.Rev.Stat. 1973, Ch. 38, Secs. 16-1(e)(2) and 1005-8-1(b)(4).

Second, defendant's contention that his sentence denied him equal protection of the law in that others involved were given sentences of substantially less duration without any difference in the acts or individuals involved is also without merit. The relevant facts on this issue are that the case against two co-defendants was dismissed, a third co-defendant received a sentence of six months in the county



jail with work release and five years probation, and a fourth co-defendant was sentenced to 1-3 years imprisonment. The other defendants who were sentenced in this case did not have a criminal record, while defendant had a substantial prior record which included probation violations. Due to various factors which are to be considered in determining a sentence, a court will not compare sentences before it with a sentence or sentences not before it. (People v. Curtin (1970), 44 Ill.2d 507, 255 N.E.2d 916.) It is not necessarily contemplated that the same sentence will be imposed on persons guilty of the same offense. People v. Sockwell (1972), 7 Ill.App.3d 520, 288 N.E.2d 33.

Third, defendant argues that he was discriminated against because he was denied the opportunity given certain other participants in the offense to clear themselves through the taking of a polygraph examination. We find that no error was committed in this regard. Discretion in the administration of polygraph examinations must necessarily be considered an adjunct to the discretionary powers of the State in prosecuting criminal conduct. No authority exists for the proposition that a defendant must be administered a polygraph examination at his request. In fact, this court has repeatedly held that polygraph evidence should not be used nor should its use be suggested at the sentencing stage of criminal proceedings because of its unreliability. (People v. McVet (1972), 7 Ill.App.3d 381, 287 N.E.2d 479.) Thus, the prosecution against the defendant would not have been barred even if defendant had successfully passed the polygraph examination.

Defendant's final argument that his sentence violates the proscription against cruel and unusual punishment in that psychological harm was inflicted upon defendant's wife and that the defendant's sentence contributed to the destruction of his family and disintegration of his home is also without merit. While a sentencing court surely has the power and perhaps the obligation to consider the family status of a defendant before it, it would certainly be a novel and indeed a dangerous proposition to require a court to fail to impose a sentence



which it believes proper because such sentence may interfere with the marital relationship of the party being sentenced.

Accordingly, since we find that this appeal would be completely frivolous and without merit, counsel's motion to withdraw is hereby granted and the judgment herein is affirmed.

AFFIRMED.

SEIDENFELD, P.J. and HALLET, J. concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L. L. RECHENMACHER, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On March 31, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

MAR 31 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
ROGER D. PARKER,)
)
Defendant-Appellant.)

Appeal from the
Circuit Court of
the 16th Judicial
Circuit, Kane
County, Illinois.

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of
the court:

The defendant, aged 20, was charged by indictment with the rape of a 9 year old girl. While represented by private counsel, he pled guilty to the charge and was sentenced to serve a term of 4 to 12 years in the penitentiary. On appeal, he claims that the trial court accepted his plea without having substantially complied with Supreme Court Rule 402(a), (b) and (c). (Ill. Rev. Stat. 1971, ch. 110A, §402(a), (b), (c).)

At arraignment and upon the State's motion, two psychiatrists were appointed to examine the defendant; the examination resulted in a finding that he was competent. Thereafter, at separate times, defendant moved to suppress evidence as to his identification and his oral statements. Both motions were denied after an evidentiary hearing. He subsequently requested to change his plea from not guilty to guilty.



The court commenced its admonition by reading to the defendant the nature of the charge as stated in the indictment and asked the defendant if it was his desire to plead guilty. The defendant replied in the affirmative. The court, on four occasions, informed the defendant that by pleading guilty he waived his right to trial by jury. On each occasion, the court asked defendant if he understood and the defendant replied affirmatively. The court then informed defendant of the minimum and maximum sentences; defendant indicated his understanding. The court asked defendant if it was his desire, and not the desire of another, to plead guilty to rape as charged in the indictment and defendant responded in the affirmative. There followed this dialogue:

"The Court: You do it willingly, and nobody has inopportuned (sic) you to do what you are undertaking to do; is that correct? Nobody told you you should do this; this is of your own judgment?

The Defendant: I was told I should.

The Court: Pardon me?

The Defendant: I was told I should.

The Court: That was Mr. Chapski's [defense counsel] judgment, I expect, but what I am interested in is are you doing it voluntarily? You have a right always to a jury trial. Nobody is trying to forestall or deny you that right.

I'll ask you again, is it your desire to plead guilty and dispose of the case on that basis?

The Defendant: No, it is not my desire, but I have to.

The Court: But why do you say you have to?

The Defendant: I have no choice.

The Court: What do you mean by that?

The Defendant: I am not the law.

The Court: I understand that. But if you say you aren't guilty, you ought to stand on your plea of not guilty. That is your right and I can't deny that right and I don't have that disposition to deny you that right. I am here to afford you that right if you want to exercise your right.

The Defendant: I'll say one thing, I am not getting a fair trial. I am mentally sick.

May I please sit down?

The Court: What?

The Defendant: May I please sit down?

The Court: Yes."

At this point, an in-court colloquy between defendant and his counsel established that counsel had informed the defendant of the State's evidence against him, advised defendant of his opinion that defendant would be found guilty if tried, apprised him of the minimum and maximum sentences that could be imposed, and told him that the time to bargain for the minimum sentence was prior to trial because after trial there would be no opportunity to do so. The discussion also revealed that on the basis of the preceeding advice, defendant had agreed to allow his counsel to discuss a plea bargain with the State's Attorney; that the bargain reached was 4 to 12 years imprisonment and that defendant had agreed to plead guilty on this basis. Discussion further revealed that defendant thought himself mentally ill, that he had twice tried to commit suicide in the past few years, and that the examinations of two physicians had found him neither mentally ill nor in need of mental treatment.

This dialogue followed:

"Mr. Chapski: So, your Honor, that brings us up to this point.

The Court: That seems to be in accord?

Mr. Wittenstrom [for the State]: It is in accord.

The Court: I have to ask you the same question: do you want to withdraw your plea of not guilty?

The Defendant: Yes. I am not guilty.

The Court: What?

The Defendant: I am not guilty.

The Court: Then we will call for the jury.

Mr. Chapski: Then, your Honor, we should have a break.

The Court: All right. Take a break."

The record reveals that during the break defendant, his wife and his attorney had a private discussion wherein the defendant again agreed to plead guilty. Upon resumption of the hearing, the trial court addressed the defendant and asked him his plea. The defendant responded, "I plead guilty." The trial judge inquired of the defendant whether this plea was made of his own

accord, of his own judgment, and knowingly; defendant responded affirmatively to each question.

The plea agreement was then presented in open court by both counsels and accepted by the trial court.

Defendant's background and the particular facts of the crime were presented by the defense counsel during the hearing in aggravation and mitigation when, in relevant part, defense counsel stated:

"That he came upon these two girls who struck up a conversation with Roger. But whether Roger in his frame of mind at that time knew what he was thinking about, it was only after he was discussing this matter with the two girls that he then took a hold of the one girl, the victim, and walked away in the woods with her and had intercourse with her.

I think she confirmed she [sic] had no weapon of any kind and that he did not use any physical force upon this girl; that in his presence at least, she made no outcry and did not cry and did not become emotionally disturbed. He took his shirt off and had her lay on the ground, and after the act of intercourse he brought her back to her girl friend, and he left.***Is there anything you want to add to that, Roger?"

There followed:

"The Defendant: No.

The Court: Speak up so the court reporter can hear you.

The Defendant: No, sir.

Mr. Chapski: Have I fairly given an account of the situation that occurred?

The Defendant: Yes, you have.

The Court: On behalf of the State, is there any exception you take to any statement counsel for the defendant made?

Mr. Wittenstrom: *** I do take exception to the statement regarding the details as to what took place during the rape. I don't [sic] agree with the defendant that there was no force used in the nature of a gun or a club. There was force used in the rape in connection with the choking of the girl.

I also take exception to the statement of the defendant that the girls initiated the conversation. I think easily that he initiated it and he enticed the girl to go across the creek with a promise of showing the baby rabbits. Except for that, I'll accept the statement.

The Court: Do you care to offer any proof to the contrary to the two exceptions made?

Mr. Chapski: No."

Thereupon, the court sentenced the defendant to the agreed-to term of 4 to 12 years in the penitentiary.

Defendant contends that the trial court failed to substantially comply with Supreme Court Rule 402(c) which provides that "the court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea." We note that the requirement of this provision must be met before entry of final judgment, whereas the admonishments under 402(a) and the determination under 402(b) must precede the acceptance of the plea of guilty. Final judgment in a criminal case is the sentence. (People v. Warship, 59 Ill. 2d 125, 129-30 (1974).) Evidence heard at the hearing in aggravation and mitigation can therefore be considered by the trial court to determine whether there was a factual basis for the plea.

It is defendant's position that the element of force, a necessary element in the offense of rape, was never established during the hearing on the guilty plea or at any point earlier. Defendant agreed with the statements of his counsel which revealed that defendant had had intercourse with the victim in the woods; no objection was raised to the exceptions of the State's Attorney which indicated that during the rape the defendant used force by choking the victim. Such indication was corroborated by the testimony of the victim's friend (taken at a prior hearing before the same judge without objection) regarding her conversation with the victim immediately following the act.

"Q. (By Mr. Chapski) Did she say anything to you?

A. (By victim's friend) Yes.

Q. What did she say?

A. Well, she was upset, you know, and she said the man choked her.

Q. Did she say anything else?

A. Well, he said--she said that he was--she said to pull down her panties, otherwise he was going to choke her. And so Melissa said she did. And then he hurt her."



On the basis of these facts, we find no merit to defendant's contention that the factual element of force was not established

Defendant contends that the trial court did not substantially comply with Supreme Court Rule 402(b) in that it failed to determine if the plea of guilty was voluntary. The rule requires that the court determine whether any force or threats or any promise apart from the plea agreement was used to obtain the plea. The trial court failed to make this exact determination.

"While we do not approve of any failure to comply strictly with the explicitly stated requirements of Rule 402, it does not follow that every deviation therefrom requires reversal. If upon review of the entire record it can be determined that the plea of guilty made under the terms of a plea agreement was voluntary, and was not made as the result of force, threats or promises other than the plea agreement, the error resulting from failure to comply strictly with Rule 402(b) is harmless. People v. Krantz, 58 Ill. 2d 187." People v. Ellis, 59 Ill. 2d 255, 257 (1974).

"While most pleas of guilty consist of: '***both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime. (Citations omitted) The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). [People v. Grant, 1 Ill. App. 3d 658 (1971).]

In order to determine whether a defendant had the requisite depth of knowledge to have understandingly and voluntarily entered a plea of guilty, courts of review will look to the entire record in a practical and realistic manner.' People v. Williams, 133 Ill. App. 2d 214, 216 (1971)." People v. Dye, 21 Ill. App. 3d 379 (1974). (Abst.)

In the instant cause, it is clear that the defendant not only understood the alternative courses open to him but that at various times during the course of the hearing he chose both routes. Eventually, with the advice of counsel, defendant chose to plead guilty, he and his counsel having agreed to do so in return for a 4 to 12 year sentence. Before accepting the plea, the trial court

ascertained that defendant entered such plea of his own accord, of his own judgment, and knowingly.

The record leaves no doubt that the defendant understood that by the terms of the plea agreement he was to serve a 4 to 12 year sentence and that he entered his plea knowingly and of his own accord. Upon consideration of the above facts and in light of the entire record, we conclude that except for the plea agreement, the defendant was promised nothing; that the plea was not the result of any force or threats; that it was entered with the advice of counsel and accepted only after the court took great pains to insure that the defendant entered his plea voluntarily. See People v. Brooks, 55 Ill. 2d 495 (1973).

Regarding Supreme Court Rule 402(a), defendant asserts that the trial court failed to determine if he understood the nature of the charge, his right to plead not guilty, and his right to confront the witnesses against him.

We hold that the court's reading of the indictment to the defendant, considered jointly with the fact that the defendant's counsel had gone over the facts with him and stated the evidence in open court, establishes that the defendant understood the nature of the charge against him. People v. Hardaman, 59 Ill. 2d 155, 157 (1974); People v. Krantz, 58 Ill. 2d 187, 192-93 (1974).

The record reveals that not only did the court specifically explain to defendant his right to plead not guilty, but that the defendant actually at one point exercised that right. Given these facts, there can be no question that the defendant understood his right to plead not guilty.

The trial court did fail to specifically inform the defendant of his right of confrontation but we note that defendant, represented by counsel, makes no claim that he did not understand this right, that he was prejudiced or harmed by this omission, that he was not satisfied with the plea agreement, or that the agreement was not honored. Under such circumstances, we find the technical error an insufficient basis for reversal since it appears from the record in its entirety that real justice has been afforded. People v. Dudley, 58 Ill. 2d 57, 61 (1974).

Judgment affirmed

RECHENMACHER, GUILD, J.J. - concur

201A. 1046^{3D}

(24540-4M-9-70) 160-o



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE FREDERICK S. GREEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 3rd day
of April A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12548

Agenda 75-47

MERRY & HENDERSON ARCHITECTS, INC.,)	
corporation,)	
)	
Plaintiff-Appellant)	
)	
v.)	
)	
RIDGEWOOD NURSING HOME, INC.,)	
corporation,	)	Appeal from
	)	Circuit Court
Defendant-Appellee	)	Sangamon County
	)	72-SC-2765
and)	
)	
LAND OF LINCOLN BANK, a banking)	
corporation,)	
)	
Garnishee)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

Plaintiff obtained a judgment against the defendant Ridgewood Nursing Home, Inc., in January of 1973. In April of that year, a writ of discovery to discover assets was issued to one John B. Rotherham, president of the defendant corporation, to appear to be examined as to matters relating to the assets of the defendant corporation.

Upon the basis of information obtained in that discovery proceeding, a garnishment summons was served upon the Land of Lincoln Bank as garnishee. The bank filed an answer to the garnishment summons stating that at the time of the service of the summons, a sum in

excess of \$13,000 was in an account of the defendant at the bank. The bank asserted that the account had been assigned to it to secure an indebtedness of the defendant corporation. By its answer, the bank sought a finding and order that it had no assets of the defendant corporation subject to garnishment. The plaintiff filed a responsive pleading denying the assignment and sought an order, the substantive effect of which would have required the payment of the account to it.

The defendant then filed a motion to strike the garnishment action. The motion to strike was based upon an assertion that the proceeding had been instituted without first having obtained leave of court, allegedly contrary to Supreme Court Rule 277(a). (Ill.Rev.Stat.1973, ch. 110A, ¶ 277(a).) The motion to strike was allowed and a judgment order was entered accordingly.

In this cause, the plaintiff apparently has taken all steps necessary for the perfection of an appeal and had complied with the requirements of the rules applicable to appellate procedure. Neither the defendant nor the garnishee has made an appearance in this court. In such a situation, this court may, within its discretion, reverse and remand the cause without consideration on its merits. We find that this disposition is appropriate here, for an examination of the record reveals that no injustice would be done by such a disposition. Accordingly, the judgment of the circuit court of Sangamon County is reversed and this cause is remanded with directions

o deny the motion to strike the garnishment action and for further
proceedings on the merits of the controversy.

REVERSED AND REMANDED WITH DIRECTIONS.

TRAPP, P.J., and GREEN, J., concur.



UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On **APR - 2 1975** the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

APR 2 1975

LOREN J. STOTZ, Clerk
Appellate Court, 2nd District
Abstract

No. 73 361

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit Court
) for the 15th Judicial Circuit,
ELLA MAE GAINES,) Stephenson County, Illinois.
)
Defendant-Appellant.)

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant was charged with delivery, and in a separate count with possession, of not more than 30 grams of a controlled substance---heroin. She was convicted in a jury trial and sentenced to not less than 1 year nor more than 18 months in the Women's Reformatory. The defendant appeals her conviction for delivery on the ground that she was not found guilty beyond a reasonable doubt because she was entrapped by the State through the use of an informant.

The informant apparently disappeared following the alleged act of entrapment and could not be located by the police, thus he did not testify at the trial. The evidence developed at the trial was substantially as follows.

The police picked up one Houston for questioning in connection with a bad check charge. In the course of the investigation they discovered he was carrying a quantity of marijuana on his person. They also noticed that his arms were scarred, indicating the use of drugs by injection. They charged him with possession of marijuana and in the course of questioning him, Houston admitted to the police that he was a heroin addict,



but said he would like to "kick" the habit. He informed the police that he knew the source of heroin coming into Freeport and would cooperate with the police by giving them the names of other users of heroin as well as their source of supply. He then told them he got his heroin from one Ella Gaines, the defendant here.

At that time, although the police did not formally charge Houston in connection with the alleged bad check, they did charge him with possession of marijuana. He was released on his own recognizance on that charge. The police then made arrangements with Houston for him to make a "controlled" buy of heroin from Ella Gaines. Pursuant to this arrangement Houston made an appointment with Ella Gaines at the apartment--met the police near the apartment and received \$50 in currency from them, two 20's and a 10. The serial numbers of each bill were recorded and each bill was dusted with ultraviolet powder. While the police waited nearby, Houston entered the building where the defendant lived and reappeared a few minutes later carrying several foil wrapped packets containing a white substance, which the police thought resembled heroin and which they immediately took charge of. The police then entered the defendant's apartment and arrested her and two other women who were present in the apartment. Three men who were also present were released after a search revealed no drugs, needles or other contraband on their persons. While in the apartment the police saw some foil packets and a syringe holder in plain view in the kitchen. The defendant and the two women were taken to police headquarters for questioning. The police then obtained a search warrant and returned to the apartment where they seized the foil packets and syringe holder, as well as a needle and a syringe, which they found in the bedroom.



The defendant and the two other women were searched at police headquarters. The search of the defendant revealed the presence of a hypodermic needle, a syringe, several foil packets with white powder in them and \$95 in cash of which \$50 was identified as the money given to the informant by the police. The foil packets were later identified by a laboratory expert as containing heroin. One of the women was found to be carrying a syringe on her person and it was also discovered that the third woman was a heroin user and was then under treatment at a local hospital.

In her testimony at the trial the defendant testified that she had known Houston for some five years; that he had lived with her from time to time during that period and had been living in her apartment for a period of several months just preceding her arrest. She further testified that she had become a heroin user herself some nine months previous to her arrest and that the heroin was supplied to her by Houston. She also testified that the only heroin she ever had was the heroin brought to her apartment by Houston; that she never had possession of any heroin of her own, and that she never bought any and never sold or delivered any. She said that the day previous to her arrest Houston had brought eleven packets wrapped in tinfoil to her apartment and left them with her, and that on the day of her arrest in the afternoon, Houston appeared at her apartment and said he would see her that evening. She stated that a few minutes previous to her arrest that evening Houston came to the apartment and said the police were looking for him; that he was "hot" and that he was going to "split", and that he needed some of the heroin he had left with her the day before. She gave him five of the packets he had given her to keep the day before. He then left and immediately afterward she was arrested. She acknowledged that Houston had

:

given her \$50 in currency at the time of his visit but explained this by saying that since he lived with her and ate at her apartment he often gave her money from time to time, and that he had told her when he handed her the \$50 that it was to help her out until he could see her again. In other words, she claims that the \$50 was for living expenses and was not payment for the heroin.

Two acquaintances of the defendant confirmed that Houston had been living in the apartment of the defendant and that they had been present when Houston came there the day before the arrest and that they saw him give the defendant several foil wrapped packets.

The defendant denied a "delivery" of the heroin to any one, contending that she merely kept the heroin entrusted to her by Houston; that she had no heroin of her own; that she did no more in connection with it than to return it to Houston when he asked for it, and that the exchange of currency and heroin packets simultaneously were coincidental and unrelated. Thus she denied there was any delivery within the meaning of the Controlled Substances Act (ch. 56 1/2, par. 1402(b), Ill. Rev. Stat. 1971).

It will be observed that while the defendant raises, as the sole issue in this appeal, the defense of entrapment, the story told by her and her witnesses at the trial does not amount to entrapment. The defendant cites the cases of People v. Strong, 21 Ill. 2d 320, People v. Dollen, 53 Ill. 2d 280, and People v. Rogers, 6 Ill. App. 3d 1092, as cases similar to her own where the defense of entrapment was upheld. However, in each of these cases there was a vital difference from her own case, as will be noted below.

The defense of entrapment is set forth in the Entrapment Section of the Criminal Code, ch. 38, sec. 7-12 (Ill. Rev. Stat. 1971, ch. 38, par. 7-12) which provides as follows:

"§7-12. Entrapment. A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated."

In construing this statute the courts have held repeatedly that the defense is not consistent with a denial of the offense involved. The doctrine of entrapment requires that the defendant admit the unlawful act and contend that the State is estopped to convict him of it because of its own unlawful instigation of such act. Thus in Strong it was contended the informer furnished the narcotic and more or less tricked the defendant into parting with it under circumstances which could be construed as a sale and since the informer did not take the stand to rebut the defendant's contention in this regard the defense of entrapment was upheld. In Dollen the circumstances were similar in that the evidence strongly hinted at the narcotic having been "planted" and the informer actually received expense money from the police on which to leave town so as to be unavailable at the trial, thus inviting an inference that he would have admitted the entrapment. In Rogers the defendant was an innocent housewife who committed the act of selling or delivering the narcotic but under such circumstances that deliberate failure to call the informer invited the inference that the housewife had been deliberately trapped, as she contended. In these and other classic cases of entrapment there is an admission of committing the essential elements of the offense but under such circumstances that the State was morally responsible for instigating it or luring the defendant into committing an offense he would otherwise not have committed.

But such is not the defendant's contention here. Her testimony at trial is not very credible but taken at its face value



it amounts to a denial of the crime, not an admission coupled with the defense of entrapment. The defendant does not say that she committed the offense of delivery but did it at the instigation of the State. She says / What I did was not 'delivery' under the statute--I was handed some packets to keep for the owner and when the owner wanted them back I handed them back to him because they were his. She discounts the inference that there was consideration for delivery of the heroin packets to Houston by the exchange of money by explaining that the two things were unrelated--the money was a customary allowance or donation from the informer based on their living together. Thus she says, in effect, that she did not commit any crime. We believe the position of the defendant is entirely incompatible with the defense of entrapment and makes the evidence attempted to be introduced to show that defense irrelevant. If the defendant had been able to convince the jury that her story as to how she came into possession of the heroin and the subsequent returning of it to the informer Houston was true, the defense would be "not guilty", rather than entrapment. It was not necessary for her to prove entrapment if she merely was a bailee for someone she was living with and had never sold or delivered any of the narcotic to any one else. In the story she tells she does not admit any guilt, hence entrapment is not germane to her defense.

Even if the defense of entrapment had been properly raised in this appeal it is our opinion that such defense was not established by the evidence. The case is, in our opinion, within the limitations set in other narcotics cases governing police conduct in obtaining evidence of a sale or delivery. (See People v. Gonzales, 125 Ill. App. 2d 225 and People v. Redding, 28 Ill. 2d 305.) There is no evidence that the police knew in advance that the informant had given heroin to the defendant to keep for him. A mere arrangement for a "controlled buy" is not per se entrapment.



People v. Jackson, 76 Ill. App. 2d 432, and People v. Gray, 27 Ill. 2d 527.

In either case, therefore, this appeal must fail. A valid defense of entrapment has not been made on the merits but in any event the defendant's own testimony is not compatible with such a defense. Had the defendant raised the issue by admitting guilt and establishing facts tending to estop the State from using the evidence of the sale and delivery under the doctrine of entrapment, a valid issue for appeal would be presented. On the basis of the defendant's position that she sold nothing and that she is not guilty of the charge of delivery, however, we cannot consider the issue of entrapment as having been properly raised.

On the other hand, if the defendant's testimony is not believed then the otherwise admitted facts, excluding her explanation of them, create an overwhelming inference of guilt. The defendant handed heroin to the informer and received \$50 from him. There were other users of narcotics in her apartment when she was arrested and there was equipment present for injecting it, indicating that the apartment was frequented by narcotics' users. While the defendant contended she was merely a custodian or bailee of the heroin in question, she had the balance of the heroin she retained in her brassiere when she was searched at the jail, indicating more than a mere bailment of it for someone else's benefit. It is not probable that the defendant risked being found with heroin on her person merely to perform a bailment. The presence of other persons in her apartment at the time of defendant's arrest, one of whom carried a syringe on her person and the other of whom was a known addict and all of whom when arrested were sitting at a table on which were foil wrapped packets and a syringe holder, indicate



al
more than person/use of the drug for the defendant herself. The absence of the informer does not, in this case, lend an inference that his testimony would corroborate hers, since due to the charges pending against him he had logical reason to make himself unavailable to the police. Moreover, there was not in this case, as in the Strong, Dollen and Rogers cases, any intimation that the heroin was supplied for this particular sale by the informer, since the defendant admitted keeping heroin for him over a period of many months preceding her arrest. The defendant has not established, therefore, either that she was innocent of knowingly "delivering" the narcotic or that she was entrapped if she did so deliver it. The jury apparently did not believe her explanation that the exchange of the money and the heroin were two unrelated facts, but on the contrary, believed that the transaction represented a sale and delivery of the heroin.

We conclude, therefore, that the issue of entrapment was not properly raised since guilt was not admitted but was denied. In any event we do not find the defendant was entrapped. The jury having found her guilty of the offense charged and the verdict not being against the manifest weight of the evidence, the judgment of the trial court is affirmed.
Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 2, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:



FILED

73-452

FEB 2 1975

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

LOREN J. STROTE, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,	)	Abstract
)	
Plaintiff-Appellee,	)	Appeal from the Sixteenth
	)	Judicial Circuit
v.)	
	)	Kane County, Illinois.
JAMES MULLEN,)	
)	
Defendant-Appellant.)	

Mr. JUSTICE GUILD delivered the opinion of the court:

The defendant herein pled guilty to two indictments for burglary, applied for probation which was denied, and was sentenced to two concurrent terms of not less than two nor more than seven years in the Illinois State Penitentiary.

The sole issue presented in this case for review is the alleged failure of the trial court to admonish the defendant of his rights under Supreme Court Rule 402 (Ill.Rev.Stat. 1973, Ch. 110A, Sec. 402.) Specifically, defendant alleges that the trial court failed to determine that the defendant understood the nature of the charges against him; that the trial court failed to advise the defendant of the possibility of imposition of consecutive sentences for the two separate burglaries; that the trial court gave no admonition to the defendant of his right to plead not guilty and to persist in such a plea; the trial court failed to admonish the defendant concerning the waiver of his right to a trial by jury and his right to be confronted with the witnesses against him; and, lastly, that the trial court did not determine a factual basis for the defendant's pleas of guilty.

At the outset, the defendant urges that we adopt the interpretation of Rule 402 as previously adopted by the Fourth and Fifth District of the Appellate Court, citing People v. Hudson (1972), 7 Ill.App.3d 800, 283 N.E.2d 533, and People v. Billops (1974), 16 Ill.



App.3d 892, 307 N.E.2d 206. We disagreed with the Fourth and Fifth Districts (See, e.g., People v. Ellis (1974), 16 App.3d 282, 306 N.E.2d 53.) However, the cases which govern the resolution of the issues presented herein are the recent Supreme Court decisions of People v. Dudley (1974), 58 Ill.2d 57, 316 N.E.2d 773, and People v. Krantz (1974), 58 Ill.2d 187, 317 N.E.2d 559 where the court specifically held that substantial compliance with Rule 402 was sufficient.

We will turn now to the specific allegations alleging failure to comply with Rule 402.

The first contention of the defendant is that the court failed to determine that the defendant understood the nature of the charges against him. It is to be noted that the defendant was charged with two burglaries and a number of other burglaries were pending against him at the same time. In addition to that he had served at least one prior sentence in the penitentiary for burglary and was obviously not a stranger to the offense of burglary. We find that the court here did, in fact, advise the defendant of the nature of the charges against him. At the arraignment he was told three times that the charges were burglary. He was given a copy of the indictment and a copy of the statements made. At the change of plea proceeding, he was again told the indictments were for burglary and the trial court read the indictments to him. It is inconceivable that the defendant could not understand the nature of the charges against him.

The next contention of the defendant is that the trial court failed to advise the defendant of the possibility of the imposition of consecutive sentences for the two separate burglaries herein involved. Defendant has cited People v. Zatz (1973), 13 Ill.App.3d 322, 300 N.E.2d 16. This argument, we feel, is specious as there is no contention whatsoever that the defendant was prejudiced in any way by the failure of the court to advise him of the possibility of consecutive sentences. As a matter of fact, consecutive sentences were not imposed and we disagree with the finding of People v. Zatz, supra, and further find that in this court's opinion, that case has

been overruled by People v. Dudley, supra, and People v. Krantz, supra.

The next contention of the defendant is that the trial court failed to admonish the defendant concerning his right to plead not guilty or to persist in such a plea. To the contrary, the court admonished the defendant that he was entitled to a trial by jury and that the burden was on the State to prove him guilty beyond a reasonable doubt, and that he was presumed innocent until proven guilty. The trial court asked the defendant if he understood that and the following question was further asked:

"THE COURT: And now the big question on the court's mind is whether you really want to enter a voluntary plea of guilty on both of these cases?

THE DEFENDANT: Well, I am guilty.

THE COURT: And it is your desire to enter a plea of guilty?

THE DEFENDANT: Yes, Sir."

The court then advised the defendant of the charges of burglary on May 19, 1972 of the Rauscherberger Furniture Store and the second burglary on July 24, 1971 of the same store and asked if that were correct. The defendant replied that one was "...in June last year, 1972." The court said. "This says July 24th." Counsel for the defendant then stated to the court:

"Your Honor, if I may say this, there are a series of burglaries. These are two of the series. The dates are correct."

It is difficult to see how the defendant in any way could have been misled as to his right to plead not guilty and to persist in such a plea under the circumstances set forth above. We find no error in this regard.

The next contention of the defendant is that the trial court did not admonish him concerning his right to trial by jury. As indicated above, this is not correct. While the court did not specifically advise defendant of his right of confrontation by the witnesses against him the court specifically stated that he was presumed innocent and that it was incumbent upon the State to prove him guilty beyond a reasonable doubt and that he was entitled to a trial by jury.



-4-

Defendant's final contention is that the court failed to determine the factual basis for the plea. As indicated in the above colloquy, the defendant readily admitted that he was guilty of the two offenses charged and his counsel further advised the court that he was involved in a series of burglaries and in addition to that the defendant had recently been released on parole from a sentence in the penitentiary for burglary. From the record it appears that the defendant had burglarized the store in question on six different occasions. In this case, as the court stated in Dudley, supra:

"There is no claim that the plea of the defendant, who was represented by counsel, was not voluntary. There is no other claim of harm or prejudice to the defendant." 58 Ill.2d at 60, 316 N.E.2d at 774.

Under the authority of People v. Krantz, supra, and People v. Dudley, supra, we find that there was more than substantial compliance with the provisions of Supreme Court Rule 402 in this case and the conviction of the defendant is affirmed.

AFFIRMED.

SEIDENFELD, P.J. and HALLETT, J. CONCUR.

73-392

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On APR - 2 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:



FILED

APR 2 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District
Abstract

No. 73 392

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit Court
) for the 17th Judicial Circuit,
RICHARD RAYMOND HENDREN,) Winnebago County, Illinois.
)
Defendant-Appellant.)

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant pleaded guilty to burglary. At the sentencing hearing the trial court had before it a lengthy pre-sentence report prepared by the Probation Officer. That report, among other things, set forth (1) the particulars of the burglary including defendant's version, the items of property taken (some of which were recovered), and the damage done to the home and furnishings; (2) his prior conviction (in 1969) for burglary, for which he served about 38 months before he was paroled, some 6 months before his maximum term expired; (3) four juvenile arrests for vandalism, disorderly conduct, curfew violation the disposition of which indicates that defendant was "lectured and released", and for burglary--larceny which resulted in an order for supervision and for payment of restitution; and (4) an FBI rap sheet listing 6 adult arrests for various offenses including forgery, burglary and disorderly conduct, showing no "disposition" by conviction or otherwise, in addition to 7 others including burglary and disorderly conduct which reflect conviction of the defendant.

1.
The sentencing hearing was extensive, with testimony by the defendant and by his mother.

-2-

Before pronouncing sentence the trial court stated:

"I can't look at this young man's record and place him on probation. I think I have to sentence him to the penitentiary."

Accordingly, the court sentenced the defendant to a term of 2 to 6 years.

The sole question presented is whether the trial court committed reversible error because of the inclusion of the juvenile and adult arrests in the pre-sentence report which did not result in convictions or other appropriate adjudications. In short the defendant argues that the trial judge should have stated to the defendant that he would not consider such unadjudicated arrests in determining sentence. We reject that argument.

In People v. Blake, 15 Ill. App. 3d 39, 44, we considered a comparable situation wherein defendant argued that the trial court considered juvenile arrests which were mentioned in the probation report. as in Blake, In the case at bar, the trial judge gave no indication whatever that he was relying on any incompetent evidence in the pre-sentence report. The defendant's record shows, in addition, that he served over 3 years for a prior burglary and that when he was released on probation his Parole Officer reported that defendant "has made a very poor adjustment since his release" and "appears to have a 'don't care attitude' about himself or anyone". As we stated in Blake, the Illinois courts "have repeatedly said that in a situation such as this it will be presumed that the court only considered proper evidence of prior offenses in imposing the sentence in a case before it." See also People v. Simpson, # 73 419, ___ Ill. App. 3d ___; People v. Fuca, 43 Ill. 2d 182.

Therefore the judgment is affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

F O O T N O T E

1. The transcript of that hearing is 27 pages in length.



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